

1   **[The R.M.C. 803 session was called to order at 0833, 1 August 2008.]**

2           MJ [CAPT ALLRED]: Court is called to order. All parties  
3 present when the court recessed are once again present. The members  
4 are not here.

5           The defense motion to dismiss Specification 2 under Charge  
6 I, under RMC 917 is denied.

7           The defense motion--is there any evidence that the  
8 interpreters are listening?

9           CT INT: Hello.

10          MJ [CAPT ALLRED]: Good morning.

11          CT INT: We're here, Your Honor.

12          MJ [CAPT ALLRED]: Okay. Thank you.

13           I was announcing that the defense motion under Rule 917 for  
14 a finding of not guilty as to Charge II--I'm sorry, Specification 2  
15 under Charge I is denied.

16           In reaching this finding, I determined that there is some  
17 evidence which, together with all reasonable inferences and  
18 applicable presumptions, could reasonably tend to establish every  
19 essential element of this charged offense. The evidence has been  
20 viewed in the light most favorable to the prosecution without an  
21 evaluation of the credibility of the witnesses.

22           As to Specifications 3 and 4 of Charge II, the motion is  
23 granted.

1 I will instruct the members on the lesser included offense  
2 of attempt.

3 There is another motion pending.

4 Okay. Apparently there's a problem getting the feed to the  
5 media center that we'll have to resolve.

6 Two weeks ago, the defense team made a motion for pretrial  
7 confinement credit or an improvement in the conditions of Mr.  
8 Hamdan's confinement and for double credit for the time in which he's  
9 been confined in punitive conditions. I have been waiting now for  
10 some additional evidence from the government, and I believe that the  
11 defense has some additional evidence they might want to offer on that  
12 motion.

13 Trial Counsel, where are we with respect to your homework?

14 TC [LCDR STONE]: I think we'll have it by this afternoon, sir.  
15 It's drafted, it's signed. We're going over the last bit to make  
16 sure that it includes everything that you had otherwise asked for,  
17 and you should have it hopefully by lunchtime.

18 MJ [CAPT ALLRED]: What exactly do you remember me having asked  
19 for?

20 TC [LCDR STONE]: I have my notes specifically here.

21 Your main concerns were to update his conditions of what  
22 his discipline status and behavior was basically from the end of the  
23 last declaration, which was February through June, but now it would

1 be through July. And then an explanation with regards to how JTF  
2 GTMO moves individuals through different----

3 MJ [CAPT ALLRED]: ----camps and levels and things.

4 TC [LCDR STONE]: The purpose of moving individuals at the times  
5 when they may otherwise be moved. We do have some information, in  
6 fact, I think we even took some of that information with regards to  
7 the last motion that was heard on the [REDACTED] information, we'll  
8 provide that. We can provide it with regards to 2003 and then 2005  
9 and then 2007 as well. I don't think that it's changed much, but  
10 there are different SOPs that both sides have and have had that  
11 probably address that.

12 MJ [CAPT ALLRED]: Okay.

13 TC [LCDR STONE]: Probably easier than anything else that would  
14 otherwise be done. And those were the two main pieces of information  
15 that you were primarily looking for.

16 MJ [CAPT ALLRED]: Okay. And is a chronology easy to come up  
17 with that indicates why he was in different camps and whether those  
18 conditions are essentially the same or different?

19 TC [LCDR STONE]: Well, the initial declaration talks about and  
20 does say that--does lay out each camp and how they're, by Bureau of  
21 Prison standards Camps 1, 2, 3, 5, and 6 are considered, the same  
22 with regards to the type of confinement that exists. That's in the  
23 original declaration. However, I think if you look at the defense's

1 motion, if you look at physically what it looks like in Camps 1, 2,  
2 and 3; there is a difference between the fact that there are wire  
3 separating detainees at Camps 1, 2, and 3 vice 5 and 6.

4           So there's--the affidavit lays out that they are  
5 technically by Bureau of Prisons standards and here considered the  
6 same type of confinement. That's already set out. There is a  
7 factual distinction that probably I think the defense mentioned that  
8 deals with, while it may technically be the same that you have a  
9 functional living difference with regards to Camps 1, 2, and 3.

10         MJ [CAPT ALLRED]: Okay.

11         TC [LCDR STONE]: The declaration will have us say that, for JTF  
12 GTMO purposes, one, two, three, five, and six are all considered the  
13 same type of cell.

14         MJ [CAPT ALLRED]: Okay. Well, I will look forward to receiving  
15 that affidavit and that explanation, then, and I will resolve this  
16 motion this weekend.

17         TC [LCDR STONE]: Yes, sir.

18         MJ [CAPT ALLRED]: Is there some additional evidence that the  
19 defense has collected from its discovery?

20         CDC [MR. SWIFT]: We did. We received a complete log of the  
21 camps, including Camp Echo, detailing things like how much exercise  
22 Mr. Hamdan received.

1           The Court has his declaration of conditions in Camp Echo at  
2 the time that the camp was put in, at the time that he filed it in  
3 the federal courts. We have now a log that proved that that  
4 conditions is exact.

5           MJ [CAPT ALLRED]: Even though the taking of evidence on the  
6 motion ended the other day, I will accept from you as well as from  
7 the government additional documents you might want to provide. And  
8 to make sure I understand what it is you're showing me, I will be  
9 happy to have you highlight for me notes on the documents so that I  
10 get what it is that these things are telling me.

11           Sometimes these camp documents are a little bit full of  
12 code, and I don't necessarily understand what you have learned about  
13 what those documents mean. Okay? Mr. Hamdan's waited patiently for  
14 a ruling on this motion, and I will give it on Monday. Okay?

15           Now, is there anything else before we call the next  
16 witness?

17           DC [LCDR MIZER]: Your Honor, I just want to be clear for the  
18 record that the central thrust of our 917 motion was Specification 1  
19 of Charge I, which I don't think you addressed on the record.

20           MJ [CAPT ALLRED]: I thought it was Specification 2.

21           DC [LCDR MIZER]: It's Specification 1, the conspiracy, Your  
22 Honor. It is the defense's position that there is no evidence again  
23 that there was an agreement by Mr. Hamdan to participate in any of

1 the most serious allegations of against him. It's the first issue  
2 addressed in the motion, the written motion that we submitted.

3 MJ [CAPT ALLRED]: Well, the reason I concluded that there was  
4 sufficient evidence with respect to Specification 2, which is another  
5 specification of conspiracy, is because I felt that the evidence  
6 suggesting that Mr. Hamdan was aware of the al Qaeda's purposes and  
7 bin Laden's plans and his oath of bayat, even conditional bayat, was  
8 enough to get over a 917 motion.

9 CDC [MR. SWIFT]: To that effect, Your Honor, I would ask for  
10 reconsideration with what you just stated, because it's charged as  
11 two separate conspiracies. And I would note, in Specification 1, we  
12 charged transportation of weapons systems, generally. In  
13 Specification 2, we charge a separate conspiracy, a separate one that  
14 exists independently of any other conspiracy. There has to be a  
15 separate meeting of the minds. And so if you're seeing this level of  
16 evidence for Specification 1 and then bringing it down to  
17 Specification 2, where does the independent conspiracy that was  
18 required for Specification 2 come from? Other than an inference  
19 that--because one has missiles, there was a separate conspiracy, and  
20 again will stand on my argument before. But there if we're using the  
21 same set of evidence to prove two separate conspiracies that does not  
22 make a lot of sense to me, at least, Your Honor.

1           So based on the Court's recitation of what it understood, I  
2 don't understand how we have established a separate conspiracy. In  
3 fact, just looking at the charges and how proof can be held on  
4 whether we had had multiplitious charges of the contingencies of  
5 proof, I don't see how Specification 2 does not merge into  
6 Specification 1, because I would note that Specification 1 is charged  
7 from 1996 until November 24, 2001.

8           Now, clearly there could be one conspiracy and a separate  
9 conspiracy in this area, but the Court has not recited, and I would  
10 ask if your written findings, if you continue to do it--the separate  
11 evidence that was sufficient to determine there was a second  
12 conspiracy for purposes of the record.

13         MJ [CAPT ALLRED]: Okay.

14         CDC [MR. SWIFT]: Thank you, Your Honor.

15         MJ [CAPT ALLRED]: Okay. Well, I'm sorry, when I listened to  
16 your argument yesterday, perhaps, I did write down Specification 2 of  
17 Charge I.

18         CDC [MR. SWIFT]: I did argue Specification 1 as well.

19         MJ [CAPT ALLRED]: Okay.

20         CDC [MR. SWIFT]: That they were proving that the government,  
21 along the lines of a criminal enterprise theory on one, and there had  
22 been no showing that he had entered into a conspiracy to kill or do  
23 any of those things. If the Court disagrees, I won't belabor the

1 point or ask for reconsideration. But, based on the Court's  
2 recitation of what you've considered, I don't see the separate  
3 evidence for Specification 2.

4 MJ [CAPT ALLRED]: Okay. Well, what I guess I should do is let  
5 Commander Stone speak.

6 TC [LCDR STONE]: Well, the only thing I can say, sir, is that I  
7 think your ruling on, I think it was, D-014 on multiplicity, where it  
8 was a hold open until the end of all evidence and then findings; and  
9 then, my understanding was, is that you would then take a look at  
10 whatever the findings happened to be, take the evidence, and then  
11 make the final ruling based on that. Which----

12 MJ [CAPT ALLRED]: Well, I am still open. And I told the  
13 members on the first day that I would probably merge any  
14 specifications that appeared to be multiplitious after findings. But  
15 I will reconsider. Over the weekend, as I look at writing the  
16 instructions and looking again at the evidence, I will take another  
17 look at that.

18 Okay. I apologize if I misunderstood your argument. Let's  
19 call the members in and continue with presentation of the defense.  
20 Shall we?

21 **[The R.M.C. 803 session terminated and the military commission**  
22 **commenced at 0848, 1 August 2008.]**



1 MJ [CAPT ALLRED]: Good morning. Thank you very much. Please  
2 be seated **[all persons did as directed]**. The members have returned  
3 to the courtroom.

4 Defense, you may call your next witness.

5 CDC [MR. MCMILLAN]: Your Honor, the defense calls Ms. Gaskins.

6 MJ [CAPT ALLRED]: Good morning.

7 If you will face the trial counsel and he will swear you  
8 in.

9 **AMY GASKINS, Civilian, was called as a witness for the defense, was**  
10 **sworn, and testified as follows:**

11 **DIRECT EXAMINATION**

12 **Questions by the trial counsel:**

13 Q [LCDR STONE]: State your name, spelling your last name.

14 A [MS. GASKINS]: My name is Amy Gaskins. G-A-S-K-I-N-S.

15 **Questions by the civilian defense counsel:**

16 Q [MR. MCMILLAN]: Good morning, Ms. Gaskins.

17 A [MS. GASKINS]: Good morning.

18 Q [MR. MCMILLAN]: My name is Joe McMillan; I'm counsel for  
19 Salim Hamdan. We've met before. Let me ask you first to state your  
20 current position.

21 A [MS. GASKINS]: I'm a government contractor, and I work for  
22 SRA International, Incorporated.

1           Q [MR. MCMILLAN]: Is your employer currently providing contract  
2 services to the Office of the Chief Defense Counsel for Military  
3 Commissions?

4           A [MS. GASKINS]: Yes.

5           Q [MR. MCMILLAN]: And have you been assigned to that project,  
6 that is, to provide services to the Offices of the Chief Defense  
7 Counsel?

8           A [MS. GASKINS]: Yes.

9           Q [MR. MCMILLAN]: Can you describe briefly what sort of  
10 services you provide?

11          A [MS. GASKINS]: I'm assigned as an intelligence analyst to do  
12 research, and also classified--look at classified documents.

13          Q [MR. MCMILLAN]: Prior to taking your current position, did  
14 you ever serve in the United States military?

15          A [MS. GASKINS]: Yes.

16          Q [MR. MCMILLAN]: Can you describe to the members which service  
17 you served in----

18          MJ [CAPT ALLRED]: Mr. McMillan----

19          Q [MR. MCMILLAN]: ----and which----

20          MJ [CAPT ALLRED]: I'm sorry; I'm getting signals from your  
21 bench that makes it sound like you're going too fast.

22          CDC [MR. MCMILLAN]: I'll slow down.

1           Q [MR. MCMILLAN]: Ms. Gaskins, could you describe to the  
2 Commission members the branch and service in which you served, and  
3 the specific department or branch that you occupied?

4           A [MS. GASKINS]: I served in the United States Army, and I was  
5 a Military Intelligence Officer.

6           Q [MR. MCMILLAN]: How long did you serve in the Army?

7           A [MS. GASKINS]: Six and a half years.

8           Q [MR. MCMILLAN]: Ms. Gaskins, do you have a security  
9 clearance?

10          A [MS. GASKINS]: Yes.

11          Q [MR. MCMILLAN]: At what level?

12          A [MS. GASKINS]: I have a Top Secret SCI, and I've also taken  
13 the CIA's full scope polygraph.

14          Q [MR. MCMILLAN]: Now, in light of your assignment to the  
15 Office of the Chief Defense Counsel, you were asked by the defense  
16 team on this case to undertake a couple of research projects. Is  
17 that correct?

18          A [MS. GASKINS]: Yes.

19          Q [MR. MCMILLAN]: Can you explain what those two projects were?

20          A [MS. GASKINS]: I was assigned to research rules of engagement  
21 that mentioned al Qaeda, and also publicly available information  
22 concerning the start of hostilities.

1 Q [MR. MCMILLAN]: Okay. Two separate investigations; one  
2 involving public records relating to Operation Enduring Freedom.  
3 Correct?

4 A [MS. GASKINS]: Yes.

5 Q [MR. MCMILLAN]: And a second relating to classified Rules of  
6 Engagement relating to Operation Enduring Freedom?

7 A [MS. GASKINS]: Yes.

8 Q [MR. MCMILLAN]: Okay.

9 CDC [MR. MCMILLAN]: Your Honor, may I have this document  
10 displayed to the military judge and to the witness.

11 MJ [CAPT ALLRED]: You may.

12 Q [MR. MCMILLAN]: Ms. Gaskins, can you identify the document on  
13 the screen?

14 A [MS. GASKINS]: Yes. It's the Authorization for Use of  
15 Military Force.

16 Q [MR. MCMILLAN]: Is this one of the items that came to your  
17 attention during the course of reviewing public documents?

18 A [MS. GASKINS]: Yes.

19 Q [MR. MCMILLAN]: And this is a Joint Resolution of the United  
20 States Congress. Is that correct?

21 A [MS. GASKINS]: Yes.

22 CDC [MR. MCMILLAN]: Your Honor, the defense requests that this  
23 document be admitted into evidence as the next defense exhibit in

1 order, which I believe would be Defense Exhibit Z, Zulu, if I get  
2 that right.

3 TC [LCDR STONE]: You got it right.

4 MJ [CAPT ALLRED]: Very well. Defense Exhibit Zulu will be  
5 admitted without objection.

6 CDC [MR. MCMILLAN]: I would request that it be displayed to the  
7 members, Your Honor.

8 MJ [CAPT ALLRED]: You may.

9 Q [MR. MCMILLAN]: Ms. Gaskins, you've identified this as the  
10 Authorization for the Use of Military Force. Can you tell us the  
11 date of this document?

12 A [MS. GASKINS]: The date is September 18, 2001.

13 Q [MR. MCMILLAN]: And can you tell us, by directing your  
14 attention to the first sentence on your screen, what the purpose of  
15 this joint resolution was?

16 A [MS. GASKINS]: The purpose of this joint resolution is to  
17 authorize the use of United States Armed Forces against those  
18 responsible for the recent attacks launched against the United  
19 States.

20 CDC [MR. MCMILLAN]: Your Honor, may I display--have this next  
21 document displayed to the witness and to the Military Judge?

22 MJ [CAPT ALLRED]: You may. Does the government need a  
23 foundation for this document?

1           ATC [MAJ ASHMAWY]: No, sir.

2           MJ [CAPT ALLRED]: What comes after Zulu?

3           CDC [MR. MCMILLAN]: Alpha-Alpha.

4           ATC [MAJ ASHMAWY]: Let the record reflect that the civilian  
5 defense counsel got it right.

6           MJ [CAPT ALLRED]: I don't want to embarrass Major Indigo, but  
7 the record will so reflect.

8           ATC [MAJ ASHMAWY]: Your Honor, I've got confirmation that the  
9 Air Force does in fact use Indigo.

10          MJ [CAPT ALLRED]: Okay. I apologize. Defense Exhibit  
11 Alpha-Alpha.

12          CDC [MR. MCMILLAN]: Your Honor, I would request that this  
13 document be admitted into evidence as Exhibit Alpha-Alpha.

14          MJ [CAPT ALLRED]: Very well.

15          CDC [MR. MCMILLAN]: And that it be displayed to the members.

16          MJ [CAPT ALLRED]: You may.

17 **Questions by the civilian defense counsel:**

18          Q [MR. MCMILLAN]: Ms. Gaskins, can you identify this document  
19 on your screen?

20          A [MS. GASKINS]: This is a Presidential Address to the Nation  
21 dated October 7, 2001.

1           Q [MR. MCMILLAN]: And very briefly, just by looking at the  
2 first paragraph of this set of remarks, can you tell us what the  
3 general purpose of these comments were?

4           A [MS. GASKINS]: The general purpose of these comments is to  
5 announce the beginning of hostile action in the Middle East toward al  
6 Qaeda and the Taliban.

7           Q [MR. MCMILLAN]: And the date of this set of remarks was?

8           A [MS. GASKINS]: October 7, 2001.

9           Q [MR. MCMILLAN]: And this announced the commencement of  
10 hostilities for Operation Enduring Freedom?

11          A [MS. GASKINS]: Yes.

12          Q [MR. MCMILLAN]: Specifically mentioning military strikes  
13 having begun against al Qaeda, and military installations of the  
14 Taliban regimes. Is that correct?

15          A [MS. GASKINS]: Yes.

16          CDC [MR. MCMILLAN]: Your Honor, the next two exhibits are  
17 classified documents. We have cleared with the court security  
18 officer the questions that we wish to ask Ms. Gaskins about these  
19 documents. I will not display them on the overhead, but I would like  
20 the bailiff to hand a copy to the witness and a copy to the Military  
21 Judge.

22          MJ [CAPT ALLRED]: Very good.

1 CDC [MR. MCMILLAN]: The prosecution has previously been  
2 provided with a copy of this document.

3 MJ [CAPT ALLRED]: Very good.

4 Q [MR. MCMILLAN]: Ms. Gaskins, can you identify the document  
5 that has been handed to you?

6 A [MS. GASKINS]: This document is the CENTCOM Standing Rules of  
7 Engagement for U.S. Forces.

8 Q [MR. MCMILLAN]: When were these rules of engagement issued,  
9 and what period of time do they cover?

10 A [MS. GASKINS]: These Rules were issued 1 October 1995, and  
11 they cover that period until the present.

12 Q [MR. MCMILLAN]: Did this set of Rules of Engagement come to  
13 your attention in the course of one of the research projects you were  
14 asked to undertake in this matter?

15 A [MS. GASKINS]: Yes.

16 CDC [MR. MCMILLAN]: Your Honor, the defense would move that  
17 this document be accepted into evidence as the next defense exhibit  
18 in order, Beta-Beta.

19 DC [LCDR MIZER]: Bravo-Bravo.

20 CDC [MR. MCMILLAN]: It was only a matter of time.

21 MJ [CAPT ALLRED]: Is that how we go to double letters, is  
22 Bravo-Bravo? Okay. Very good. Without objection, apparently,  
23 Defense Exhibit Bravo-Bravo can be admitted into evidence and the



1 words "for identification" be stricken. I will give my copy to the  
2 court reporter, what appears to be the original.

3 Q [MR. MCMILLAN]: Ms. Gaskins, do these standing Rules of  
4 Engagement for CENTCOM make any mention at all of al Qaeda as an  
5 enemy of the United States?

6 A [MS. GASKINS]: No.

7 Q [MR. MCMILLAN]: Do they authorize strikes against al Qaeda?

8 A [MS. GASKINS]: No, they do not.

9 Q [MR. MCMILLAN]: Do they mention or authorize strikes against  
10 terrorists, generally?

11 A [MS. GASKINS]: No.

12 Q [MR. MCMILLAN]: Are these Rules of Engagement still in  
13 effect?

14 A [MS. GASKINS]: Yes.

15 Q [MR. MCMILLAN]: And can you remind us when they were first  
16 issued?

17 A [MS. GASKINS]: 1 October 1995.

18 Q [MR. MCMILLAN]: And this relates to which theater of command?

19 A [MS. GASKINS]: U.S. CENTCOM, Central Command.

20 CDC [MR. MCMILLAN]: Your Honor, could I ask the bailiff to hand  
21 the witness the next classified document? And there's a copy for the  
22 Military Judge.

23 MJ [CAPT ALLRED]: You may.

1 Q [MR. MCMILLAN]: Ms. Gaskins, can you identify this document?

2 A [MS. GASKINS]: These are the Rules of Engagement, Serial 2,  
3 for Operation Enduring Freedom.

4 Q [MR. MCMILLAN]: Is this set of Rules of Engagement  
5 subordinate to the theater-wide Rules of Engagement issued by  
6 CENTCOM?

7 A [MS. GASKINS]: Yes.

8 Q [MR. MCMILLAN]: So is this an operation-specific set of Rules  
9 of Engagement within the CENTCOM area of command?

10 A [MS. GASKINS]: Yes.

11 Q [MR. MCMILLAN]: Was this a document that you also found in  
12 the course of your research project in this matter?

13 A [MS. GASKINS]: Yes, it is.

14 CDC [MR. MCMILLAN]: Your Honor, the defense would move that  
15 this document be admitted into evidence as Defense Exhibit  
16 Charlie-Charlie.

17 MJ [CAPT ALLRED]: Very well. Without objection, this will be  
18 admitted, apparently.

19 CTC [MR. TRIVETT]: No objections.

20 MJ [CAPT ALLRED]: Okay. I will give my copy to the court  
21 reporter.

1           Q [MR. MCMILLAN]: Ms. Gaskins, does this document, the Rules of  
2 Engagement for Operation Enduring Freedom, identify al Qaeda  
3 explicitly?

4           A [MS. GASKINS]: Yes, it does.

5           Q [MR. MCMILLAN]: Does this document authorize status-based  
6 strikes against al Qaeda?

7           A [MS. GASKINS]: Yes.

8           Q [MR. MCMILLAN]: Does it authorize strikes against command and  
9 control elements of al Qaeda expressly?

10          A [MS. GASKINS]: Yes, it does.

11          Q [MR. MCMILLAN]: Is this the first time in the record of your  
12 search where you found any reference to al Qaeda?

13          A [MS. GASKINS]: Yes, it is.

14          Q [MR. MCMILLAN]: Your review of classified rules of engagement  
15 identified nothing earlier mentioning al Qaeda explicitly?

16          A [MS. GASKINS]: Not up to the SECRET level. No.

17          Q [MR. MCMILLAN]: As you look at this document, Ms. Gaskins,  
18 are you able to determine the date on which this set of Rules of  
19 Engagement for Operation Enduring Freedom was first issued?

20          A [MS. GASKINS]: The original Rules of Engagement are dated 5  
21 October. This is based on the message traffic at the beginning of  
22 this document. This is a serial 2. It's combining all previous  
23 Rules of Engagement for Operation Enduring Freedom.

1           Q [MR. MCMILLAN]: Is it 5 October or is it 6 October,  
2 Ms. Gaskins, that the first Rule of Engagement for Operation Enduring  
3 Freedom was published? Do you recall Ms. Gaskins--let me ask this  
4 next question.

5           Do you recall previously mentioning to me that an execute--  
6 a Strike Execute Order was apparent in the message traffic in this  
7 set of rules of engagement?

8           A [MS. GASKINS]: Yes.

9           Q [MR. MCMILLAN]: And what was the date of that strike execute  
10 order?

11          A [MS. GASKINS]: The Strike Execute Order was dated October  
12 5th, 2001. The first Rule of Engagement is dated October 6th.

13          Q [MR. MCMILLAN]: Now, is there also a reference to October 2,  
14 2001 visible in that document?

15          A [MS. GASKINS]: Yes, there is.

16          Q [MR. MCMILLAN]: And what occurred or what was ordered on  
17 October 2, 2001?

18          A [MS. GASKINS]: On October 2nd, there's a Rules of Engagement  
19 for noncombatant evacuation operations.

20          Q [MR. MCMILLAN]: So the Authorization for the Use of Military  
21 Force against those responsible for the September 11th attacks is  
22 September 18th. Is that correct?

23          A [MS. GASKINS]: Yes.

1 Q [MR. MCMILLAN]: The order to evacuate civilians from  
2 Afghanistan was October 2nd, 2001?

3 A [MS. GASKINS]: Yes.

4 Q [MR. MCMILLAN]: A Strike Execute Order was issued October 5,  
5 2001?

6 A [MS. GASKINS]: Yes.

7 Q [MR. MCMILLAN]: The Rule of Engagement that expressly  
8 mentioned al Qaeda and authorized status based strikes against al  
9 Qaeda is dated October 6, 2001?

10 A [MS. GASKINS]: Yes, it is.

11 Q [MR. MCMILLAN]: And the President announced to the Nation in  
12 an address from the White House on October 7th that strikes had  
13 begun. Is that correct?

14 A [MS. GASKINS]: Yes.

15 CDC [MR. MCMILLAN]: Thank you, Ms. Gaskins.

16 I have no further questions.

17 MJ [CAPT ALLRED]: Very good.

18 Bailiff, would you return those two SECRET documents to Mr.  
19 McMillan, please; unless the witness will need them.

20 **[The bailiff did as directed.]**

21 CTC [MR. TRIVETT]: Good morning, Ms. Gaskins.

22 WIT [MS. GASKINS]: Good morning.

23

1 **CROSS-EXAMINATION**

2 **Questions by the civilian trial counsel:**

3 Q [MR. TRIVETT]: Can you briefly describe how you went about  
4 conducting your search regarding armed conflict?

5 A [MS. GASKINS]: I originally did an unclassified search,  
6 obviously, open sourced, and academic data bases as well as journal  
7 data bases. And then I went to the SIPRNET, which is the military's  
8 SECRET level, and used various search engines and also data bases  
9 that can find message traffic and documents classified at the SECRET  
10 level and below.

11 Q [MR. TRIVETT]: What exactly were you looking for? What kind  
12 of information were you looking for during your search?

13 A [MS. GASKINS]: I was looking for rules of engagement that  
14 mentioned al Qaeda.

15 Q [MR. TRIVETT]: So your entire search was limited to rules of  
16 engagement?

17 A [MS. GASKINS]: Yes.

18 Q [MR. TRIVETT]: Did you just search for al Qaeda? Or did you  
19 also search for Usama bin Laden?

20 A [MS. GASKINS]: I searched for both. Both are mentioned in  
21 the rules of engagement.

1           Q [MR. TRIVETT]: So, just so we're clear. All you were looking  
2 for were rules of engagement. You weren't looking for any other  
3 public statements by any public officials regarding the United  
4 States' response to anything that al Qaeda has done?

5           A [MS. GASKINS]: That was my original search. That was only in  
6 open source.

7           Q [MR. TRIVETT]: Were you aware of the bombing in Aden, Yemen,  
8 when our soldiers, who were en route to Somalia back in 1992, were  
9 intentionally targeted by al Qaeda operatives?

10          A [MS. GASKINS]: I'm aware of that. Yes.

11          Q [MR. TRIVETT]: Did you find that significant in regard to  
12 your search on whether an armed conflict existed?

13          A [MS. GASKINS]: Yes. I searched documents back to the late  
14 1980s, but have not seen at the SECRET level or below any documents  
15 that contained al Qaeda in their rules of engagement.

16          Q [MR. TRIVETT]: Well, isn't it true that the United States  
17 wasn't aware that Usama bin Laden's organization was even called al  
18 Qaeda until roughly 1996?

19          A [MS. GASKINS]: That's correct.

20          Q [MR. TRIVETT]: Did you look at also the bombing in Riyadh,  
21 Saudi Arabia?

22          A [MS. GASKINS]: No, I did not.

1 Q [MR. TRIVETT]: In your search, did you find Usama bin Laden's  
2 1996 declaration of war?

3 A [MS. GASKINS]: No, I did not.

4 Q [MR. TRIVETT]: Have you read that document before? Are you  
5 familiar with that document?

6 A [MS. GASKINS]: No, I'm not.

7 Q [MR. TRIVETT]: How about the 1998 fatwa, where he declared  
8 that civilians were legitimate targets in his war and that they could  
9 be killed anywhere in the world, wherever they could be found?

10 A [MS. GASKINS]: It's my understanding that that's correct  
11 based on the embassy bombings that took place that year.

12 Q [MR. TRIVETT]: And that was in fact done prior to the embassy  
13 bombings. Right?

14 A [MS. GASKINS]: Yes.

15 Q [MR. TRIVETT]: You would agree that is significant in  
16 determining whether or not there was a period of armed conflict if  
17 our enemies declared war against us. Correct?

18 CDC [MR. MCMILLAN]: Objection, Your Honor. This calls for a  
19 legal conclusion that is well beyond the scope of direct.

20 MJ [CAPT ALLRED]: Sustained.

21 Q [MR. TRIVETT]: You're familiar with the 1998 attacks on the  
22 U.S. embassies you just referenced. Correct?

23 A [MS. GASKINS]: Yes.







1 Q [MR. TRIVETT]: So there were no rules of engagement that you  
2 found despite the fact that we did respond militarily in 1998.  
3 Correct?

4 A [MS. GASKINS]: I did not find them at the SECRET level or  
5 below.

6 Q [MR. TRIVETT]: You're familiar with the attack on the USS  
7 Cole that killed 17 sailors?

8 A [MS. GASKINS]: Yes.

9 Q [MR. TRIVETT]: Did you find any Rule of Engagement  
10 authorizing our response to that attack?

11 A [MS. GASKINS]: Not at the SECRET level or below.

12 Q [MR. TRIVETT]: Do you believe we were authorized to respond  
13 had we had actionable intelligence on where Usama bin Laden was?

14 CDC [MR. MCMILLAN]: Objection, Your Honor.

15 This calls for speculation. Again, it's beyond the scope.  
16 It calls for an opinion----

17 MJ [CAPT ALLRED]: ----well, ask her if she knows, not whether  
18 she believes, because if she knows, she can answer. And if she  
19 doesn't know, that will be her answer to it.

20 CTC [MR. TRIVETT]: Yes, sir.

21 [END OF PAGE]

22

23

1           Q [MR. TRIVETT]: Do you know if we were authorized under the  
2 laws of war to respond to the attack on the USS Cole in October of  
3 2000?

4           A [MS. GASKINS]: I haven't seen any documents that reference a  
5 response, so I don't.

6           Q [MR. TRIVETT]: Are you aware of the attacks on 11 September  
7 2001 which killed 2,973 Americans?

8           A [MS. GASKINS]: Yes.

9           Q [MR. TRIVETT]: When was the first time that you saw a Rule of  
10 Engagement authorizing our response to that?

11          A [MS. GASKINS]: The first Rule of Engagement I saw was dated 6  
12 October 2001.

13          Q [MR. TRIVETT]: Do you know if we were authorized to respond  
14 militarily immediately had we known where our proper target package  
15 was after the attacks on 11 September 2001.

16          CDC [MR. MCMILLAN]: Your Honor, this is the same question.

17          MJ [CAPT ALLRED]: This is the same problem. We're not asking  
18 her to be an expert in the law of armed conflict. We're just asking  
19 about what documents she found and what they reflect.

20          CTC [MR. TRIVETT]: I will move on, sir.

21          Q [MR. TRIVETT]: What was the date of the President's statement  
22 to the Nation?

23          A [MS. GASKINS]: October 7th, 2001.

1 Q [MR. TRIVETT]: Isn't it true that the President also made not  
2 only another public statement, but actually a military order on 13  
3 November 2001?

4 A [MS. GASKINS]: I couldn't say.

5 Q [MR. TRIVETT]: So in all of your searches of all of the  
6 public statements of officials near or around September 11, 2001, you  
7 weren't aware that the President gave an order that would allow for  
8 the detention and trial of certain detainees?

9 A [MS. GASKINS]: I don't. I was looking for the nearest rules  
10 of engagement that I could find.

11 Q [MR. TRIVETT]: Were you aware specifically that he had found  
12 attacks on our diplomatic facilities, our U.S. warships, and the  
13 attacks of September 11th, to have given rise to an armed conflict to  
14 which the laws of war would apply?

15 A [MS. GASKINS]: I believe that goes beyond my scope of whether  
16 a rise of armed conflict dictates an armed conflict.

17 CTC [MR. TRIVETT]: Thank you, Ms. Gaskins.

18 No further questions.

19 [END OF PAGE]

1 **REDIRECT EXAMINATION**

2 **Questions by the civilian defense counsel:**

3 Q [MR. MCMILLAN]: Just one question on redirect, Ms. Gaskins.  
4 Do you have an understanding as to why the defense felt it necessary  
5 to ask you to search for rules of engagement mentioning al Qaeda?

6 A [MS. GASKINS]: Yes.

7 Q [MR. MCMILLAN]: Could you explain what that was?

8 A [MS. GASKINS]: It was important to search for rules of  
9 engagement because rules of engagement named specifically a targeted  
10 enemy.

11 Q [MR. MCMILLAN]: Do you have an understanding as to whether  
12 the defense had requested the prosecution to produce rules of  
13 engagement mentioning al Qaeda?

14 A [MS. GASKINS]: Yes.

15 Q [MR. MCMILLAN]: Do you know what the response from the  
16 prosecution was to that discovery request?

17 A [MS. GASKINS]: The response to that discovery request was any  
18 rules of engagement that mentioned al Qaeda would be publicly  
19 available.

20 CDC [MR. MCMILLAN]: Thank you.

21 No further questions.

22 CTC [MR. TRIVETT]: No further questions, sir.

1 MJ [CAPT ALLRED]: Members of the court do you have any  
2 questions for Ms. Gaskins? I think it seems like no.

3 Thank you very much, ma'am, for your testimony. You are  
4 excused from the courtroom.

5 CDC [MR. SCHNEIDER]: Good morning, Your Honor.

6 MJ [CAPT ALLRED]: Good morning.

7 CDC [MR. SCHNEIDER]: The defense has two witnesses left, both  
8 of whom we expect to complete before the morning recess, and I  
9 propose to try to accomplish that right now.

10 As of this morning, neither of these witnesses is available  
11 to testify in court. And what I would like to do is to lay out the  
12 foundation for the admission of written answers to questions. And I  
13 would like to do that--I will do that to the best of my ability  
14 without commenting on the substance of the evidence. But I think it  
15 will save time, instead of following the government security officer,  
16 to indicate.

17 With your permission, I would like to have handed to both  
18 the clerk and Your Honor a set of the exhibits that I will be going  
19 through. And they will be marked--I hope they will be marked as my  
20 request for identification I believe starting at Exhibit Delta-Delta  
21 for identification. And I would ask that the first document set be  
22 marked at this time for identification as to Defense Exhibit  
23 Delta-Delta.

1           Your Honor, this is a 13-page type-written document  
2   entitled Questions for Detainees. It is in English; it is undated.  
3   I will represent to the Court that it was prepared in February 2008,  
4   following the Court's 13 February order. It was transmitted to the  
5   Government on 3 March. It was transmitted again on 18 March  
6   following an additional ruling of the Court dated 14 March. It was  
7   cleared for transmission to certain inhabitants at Guantanamo.  
8   On 27 March it's delivered from Washington, D.C. from the government  
9   security officer to Guantanamo. We were informed that the week of 31  
10   March this was delivered to detainee Khalid Sheikh Mohammed, also  
11   known as KSM.

12           At this time, I would ask that the second exhibit in the  
13   group be marked as--Echo-Echo?

14           MJ [CAPT ALLRED]: Okay, I'm sorry. Now, Delta-Delta is the  
15   English questions? The Arabic version of the English questions?

16           CDC [MR. SCHNEIDER]: Precisely.

17           MJ [CAPT ALLRED]: And the first set of responses from KSM is  
18   Echo-Echo?

19           CDC [MR. SCHNEIDER]: To be clear, the document in Arabic is  
20   Echo-Echo.

21           MJ [CAPT ALLRED]: Okay. I'm sorry.

22           CDC [MR. SCHNEIDER]: It's the second stapled document in the  
23   group.



1 MJ [CAPT ALLRED]: Oh, staples.

2 CDC [MR. SCHNEIDER]: Sorry. I think if Your Honor would remove  
3 the big paper clip that might facilitate following the presentation.

4 MJ [CAPT ALLRED]: I'm with you.

5 CDC [MR. SCHNEIDER]: It is our understanding that the Arabic  
6 version also was cleared by the government security officer and  
7 delivered to the detainee KSM sometime during the week of 31 March.  
8 I would ask that the third stapled document in the package be marked  
9 as I believe Foxtrot-Foxtrot. How am I doing? Okay.

10 Your Honor, this is what we understand to be the English  
11 type-written four-page answers provided by KSM, submitted to the  
12 government security officer for clearance, redactions made where  
13 indicated by that entity or person, and returned to us in the format  
14 you have in front of you, on 30 April 2008.

15 MJ [CAPT ALLRED]: Very good.

16 CDC [MR. SCHNEIDER]: Your Honor, the last--not the last, but  
17 the fourth stapled document in the package is a 16-page document. I  
18 will tell you that this is simply an integrated set of the questions  
19 in English, Exhibit Delta-Delta, and KSM's answers in the English  
20 which is Foxtrot-Foxtrot. I would call them the integrated answers  
21 and questions for KSM.

22 I would ask that the next document in order be marked for  
23 identification at this time as Defense Exhibit Golf-Golf.

1           Needless to say, if one of my colleagues wanted to play a  
2   trick on me, I could really embarrass myself with these. But I think  
3   so far I have been given accurate, complete, and appropriate  
4   information that checks out.

5           Golf-Golf, Your Honor, is--let me say this. That the same  
6   first two documents, Delta-Delta and Echo-Echo, also were sent to  
7   Detainee [REDACTED], Walid bin Attash. The document that you have before  
8   you marked for identification as Golf-Golf--excuse me--as Hotel-Hotel  
9   would be the typewritten answers in English, which we understand were  
10  received from that individual sometime I believe in June, and  
11  returned to us also in June. I can give you the precise dates if you  
12  need them.

13          The last exhibit in order, which I would ask be marked for  
14  identification only at this time, would be Defense Exhibit  
15  India-India. It is, Your Honor, an integrated set of the questions  
16  for detainees, which is also Exhibit Delta-Delta, and Mr. bin  
17  Attash's written answers which were transmitted to us. I see I have  
18  the date there 1 July 2008, not June. And so there, that would be an  
19  integrated combination of Delta-Delta and Hotel-Hotel, the integrated  
20  answers being marked for identification only as India-India.

21          I'm prepared to make representations regarding  
22  unavailability of the witness. I think I can do it also without  
23  commenting on the evidence.

1           We have been in contact with detailed counsel for each of  
2 those individuals. It's our understanding that, with regard to  
3 Khalid Sheikh Mohammed, he is intending to invoke self-incrimination  
4 rights and not appear.

5           The arrangements were made for the first time to be able to  
6 visit with him individually. Lieutenant Commander Mizer was cleared  
7 for a visit on Sunday, July 20. Mr. Mohammed had sent word that he  
8 would not be available, in his view, would not meet with Lieutenant  
9 Commander Mizer, and would not voluntarily appear in court. He is  
10 aware that the written answers are available as a substitute.

11           Mr. bin Attash, his counsel, both--I will also say, no  
12 surprise, both individuals have been charged with crimes. I won't go  
13 into the details.

14           Mr. bin Attash we are told through counsel would meet with  
15 Lieutenant Commander Mizer. Arrangements were made for the first  
16 time for Lieutenant Commander Mizer, who has the appropriate security  
17 clearance, to meet with Mr. bin Attash, and he did so 20 July,  
18 Sunday, the day before trial. I will advise the Court that Mr. bin  
19 Attash expressed that he would consider coming here and testifying,  
20 but he wanted to think about it. He wanted to pray about it over the  
21 weekend.

22           Lieutenant Commander Mizer was permitted to meet with him  
23 again I believe on Sunday, July 27, at which time Mr. bin Attash

1 effectively sent his regards to the Court and said that he would not  
2 be coming voluntarily in light of the written answers.

3           It is our position, again without commenting on any  
4 substance, that under the Rules for Military Commission 703, the  
5 written answers are appropriate given the unavailability of the  
6 witness at this time. We would offer them both under the Court's  
7 previous orders as in effect written answers to written questions  
8 permitted by rule 702(c) and (g).

9           As the Court may be aware, we gave notice on July 10 under  
10 the hearsay provision, which is rule, I believe it's 803. We believe  
11 that, given the invocation of whatever privileges attach under  
12 Military Commission Rule of Evidence 301 and the Fifth Amendment, the  
13 witness is unavailable. And in light of objections to trial  
14 testimony based on national security, we think that the written  
15 answers are probative under Evidence Rule 401, admissible under rule  
16 402, not classified under rule 505, competent under rule 601, based  
17 on personal knowledge on their face based on rule 602. And given the  
18 unavailability of the witness under Military Rules of Evidence as I  
19 understand them, under the Manual For Courts-Martial, these witnesses  
20 either will--either should be excused in this Court's discretion  
21 based on the assertion of a privilege under 804(a)(1), the refusal to  
22 testify under (a)(2), or unavailability under (a)(5) of rule 804,

1 and, as I understand it, under Article 49(b)(2) of the Manual For  
2 Courts-Martial.

3 We also believe it is admissible under the hearsay  
4 exception as a statement against interest under 804(a)(b)(3). That  
5 would be A Bravo 3. We believe it is a statement against interest.  
6 Again, I don't intend to comment on the evidence based on that the  
7 declarant's penal interests would be so contrary to a reasonable  
8 person's understanding that the statements should be considered to  
9 have probative value and be reliable evidence.

10 I am prepared to offer additional discussion of the basis  
11 for the offer, but I would suggest that what I've said so far should  
12 be sufficient to permit counsel for the government to respond if they  
13 wish and for the Court to consider it.

14 At this time, the defense offers into evidence Exhibits  
15 Delta-Delta, Echo-Echo, Foxtrot-Foxtrot, Golf-Golf, Hotel-Hotel, and  
16 India-India; and, if admitted into evidence, would ask that the  
17 exhibits be passed among the members at this time.

18 What I would propose there, just so you know what's coming,  
19 is that the originals would stay in the clerk's possession; we would  
20 make copies so that one set need not be passed seriatim, and that  
21 those courtesy copies would be collected after members have an  
22 opportunity to review in court the written answers as much or as  
23 little as they wish. And the only documents that would go into the

1 deliberations would be those, the one set of originals that are  
2 admitted into evidence, if admitted. The courtesy copies would be  
3 collected at the time that the members are excused from the  
4 courtroom.

5 MJ [CAPT ALLRED]: Very well. Thank you for your proffer.

6 Does the government object to the introduction of these  
7 exhibits?

8 CTC [MR. TRIVETT]: Sir, can we have five minutes to confer  
9 amongst each other prior to giving you our objection, if any?

10 MJ [CAPT ALLRED]: Sure. Why don't we take a recess?

11 **[The military commission recessed at 0927, 1 August 2008.]**

12 **[The R.M.C. 803 session was called to order at 0941, 1 August 2008.]**

13 **All parties present when the commission recessed were once again**  
14 **present. The members were absent.]**

15 MJ [CAPT ALLRED]: Court is called to order.

16 Is there government objection to these last six exhibits  
17 from the defense?

18 CTC [MR. TRIVETT]: Sir, can we set forth our objection in front  
19 of the members?

20 MJ [CAPT ALLRED]: No. I don't think you need to. I mean, I'm  
21 going to rule on it. They don't need to hear it. Do they?

22 CTC [MR. TRIVETT]: Well, we think it's important that they hear  
23 it, just based on certain representations that were made by defense

1 counsel that the prosecution doesn't necessarily agree with, although  
2 we don't think it was an intentional misrepresentation.

3 MJ [CAPT ALLRED]: Okay. We will call the members back into the  
4 courtroom. They can hear this if you think it's important.

5 **[The members entered the courtroom.]**

6 **[The R.M.C. 803 session terminated and the military commission**  
7 **commenced at 0942, 1 August 2008.]**

8 MJ [CAPT ALLRED]: Thank you. Please be seated **[all persons did**  
9 **as directed]**. The members have returned to the courtroom.

10 Trial counsel, what's the government's response to the  
11 defense offer of these last six exhibits?

12 CTC [MR. TRIVETT]: Sir, in responding to certain  
13 representations from the defense counsel, it's the prosecution's  
14 understanding, based on the fact that I'm one of the prosecutors in  
15 the case in which Khalid Sheikh Mohammed and Walid bin Attash are  
16 being charged with, they're involved with the 9/11 case, is that they  
17 represent themselves. They've made it very clear on the record that  
18 they in fact represent themselves. Any representations by anyone as  
19 their stand-by counsel, whether it be Captain Prescott Prince or Mr.  
20 Ed McMahon, both of which are on their team, would not satisfy any  
21 requirement from the accuseds themselves that they are in fact  
22 unavailable or were unwilling to testify. So we just wanted to  
23 clarify that aspect of it.

1           We in no way think that the defense intentionally  
2 misrepresented that. But based on the facts as we know them, we  
3 wanted the record very clear that that is our understanding.  
4 Furthermore, the prosecution--we want the record to state very  
5 clearly that the prosecution is in no way at this time preventing  
6 them from coming to testify. We have in fact requested as an  
7 alternative to their testimony that they be given a videotaped  
8 deposition in which both defense and prosecution would be able to  
9 question and cross-examine them and their answers that are based in  
10 these records. But that being said, sir, we have no objection to--we  
11 have no objection to them.

12       MJ [CAPT ALLRED]: Okay.

13       CTC [MR. TRIVETT]: We just want it very clear for the record  
14 that that's the position of the U.S. Government.

15       MJ [CAPT ALLRED]: Okay. I thought you were going to make me  
16 make a hard decision here. No objection. And I don't think Mr.  
17 Schneider intended to misrepresent anything. Did you? It's been a  
18 long road to try to see whether these witnesses could be made  
19 available or would come.

20       CDC [MR. SCHNEIDER]: I can clarify one thing. It's not an  
21 attempt to argue; it's actually an attempt to educate.

22       MJ [CAPT ALLRED]: Me?

23       CDC [MR. SCHNEIDER]: No.



1 MJ [CAPT ALLRED]: Or Mr. Trivett?

2 CDC [MR. SCHNEIDER]: You're well aware, sir. Mr. Trivett.

3 Just to be clear, the counsels who were detailed to represent those  
4 two individuals, or who were otherwise engaged, communicated to us  
5 that they felt they were still in a position to make whatever  
6 representation they told us.

7 Second, Mr. bin Attash communicated his position in person,  
8 through a translator while he was incarcerated, to Lieutenant  
9 Commander Mizer. KSM sent a handwritten note translated. So this  
10 isn't just--well, that's what happened.

11 MJ [CAPT ALLRED]: Okay.

12 Well, members, you have been treated to representations by  
13 both counsel, and there is no objection from the government to these  
14 six exhibits. And, therefore, without objection, but noting the  
15 positions of both parties, I will admit Defense Exhibits Delta-Delta  
16 through India-India. And you may--bailiff, if you will give copies  
17 to each of the members.

18 CDC [MR. SCHNEIDER]: Again, we would ask that the members each  
19 be given a courtesy copy at this time to review as they sit in court.  
20 And when sufficient time, in Your Honor's discretion, has transpired  
21 we would propose that we would collect the courtesy copies and that  
22 they would then have available to them the original admitted into  
23 evidence along with all the other evidence admitted.

1 MJ [CAPT ALLRED]: Okay.

2 CDC [MR. SCHNEIDER]: At this point, I will sit down, unless you  
3 have any questions for me.

4 MJ [CAPT ALLRED]: No. Well, my only question is kind of for  
5 the defense team. Are there other witnesses that you intend to call  
6 now?

7 CDC [MR. SCHNEIDER]: No. We would rest at this time. And we  
8 would like to give the members sufficient time to review the last six  
9 exhibits admitted, at the completion of which the defense rests its  
10 case.

11 MJ [CAPT ALLRED]: Okay. Well, let me ask the government to  
12 think, while the members are reading, about whether they have  
13 evidence in rebuttal that they would like to offer.

14 CDC [MR. SCHNEIDER]: I made a mistake. I made six copies, and  
15 we have seven members.

16 MJ [CAPT ALLRED]: Oh, here. You can----

17 CDC [MR. SCHNEIDER]: Is that okay?

18 MJ [CAPT ALLRED]: Here's one more.

19 CDC [MR. SCHNEIDER]: My apologies.

20 CTC [MR. MURPHY]: Your Honor, may we have a few minutes?

21 MJ [CAPT ALLRED]: There was talk of a video teleconference  
22 witness. Did you choose not to call that witness, or is there a time

1 issue that we need to resolve so that you can still call that  
2 witness?

3 CDC [MR. MCMILLAN]: No. She will not be called by the defense,  
4 Your Honor.

5 MJ [CAPT ALLRED]: Very good. Okay. So you're prepared to rest  
6 then and haven't been prejudiced by the timing of the court sessions.

7 CDC [MR. SCHNEIDER]: No. We made a decision in light of the  
8 evidence in the case not to call.

9 MJ [CAPT ALLRED]: Fair enough. Very good. Thank you, sir.

10 **[The members read and examined DE DD through II.]**

11 MJ [CAPT ALLRED]: Do any of the members need additional time to  
12 review this? **[The members nodded in response]** Okay.

13 **[The members continued reading and examining DE DD through II.]**

14 Okay, members, it looks like everyone has had sufficient  
15 time to read those exhibits.

16 Bailiff, if you will collect them, please; and return them  
17 to the defense. **[The bailiff did as directed.]**

18 A copy or I should say the original of these documents will  
19 be provided to you when you retire to deliberate with all the other  
20 evidence that has been admitted, all the other documents and  
21 photographs and things that have been admitted. And you will be able  
22 to consult them along with all the other evidence during your  
23 deliberations.

1 Does this represent the end of the defense case then?

2 CTC [MR. TRIVETT]: It does, Your Honor.

3 MJ [CAPT ALLRED]: Very good. Thank you. Does the government  
4 have any evidence to offer in rebuttal?

5 CTC [MR. TRIVETT]: Sir, we have one document we may need to  
6 litigate its admissibility outside the presence of the members.

7 MJ [CAPT ALLRED]: We do?

8 CDC [MR. SWIFT]: I concur, Your Honor.

9 MJ [CAPT ALLRED]: Okay. Well, members, if you will step into  
10 the deliberation room, we will take up the final piece of evidence.

11 BAILIFF: All rise.

12 **[All persons did as directed, and the members withdrew from the**  
13 **courtroom.]**

14 **[The military commission recessed terminated and the R.M.C. 803**  
15 **session commenced at 1017, 1 August 2008.]**

16 MJ [CAPT ALLRED]: Okay. The members have withdrawn from the  
17 courtroom. Please be seated. **[All persons did as directed.]**

18 What is the final document?

19 CTC [MR. TRIVETT]: Sir, it's the only document the prosecution  
20 would ask to be admitted in its rebuttal case. It's a statement of  
21 former Secretary of State Madeleine K. Albright. She made it on  
22 March 23, 2004 in one of the public hearings. It's described as  
23 testimony before the Commission, but it is a prepared written

1 statement. To my knowledge, it's not in the final 9/11 Commission  
2 Report, but it can be found on the official 9/11 Commission Web Site  
3 and as part of the public record.

4 MJ [CAPT ALLRED]: Do you have a copy of it to mark? This is  
5 prosecution exhibit, what?

6 CTC [MR. TRIVETT]: It's the next one in order, sir.

7 MJ [CAPT ALLRED]: 146. Prosecution 146 is marked for  
8 identification. Have you shown this to the defense?

9 CTC [MR. TRIVETT]: Not yet, sir.

10 MJ [CAPT ALLRED]: Do you know your objection without looking at  
11 the document?

12 CDC [MR. SWIFT]: I'm handling it, sir.

13 MJ [CAPT ALLRED]: Okay.

14 CDC [MR. SWIFT]: Yes, Your Honor, I do. I object on the basis  
15 of hearsay. Although it's within a public record, it's not a  
16 statement of a public official in that Madeleine Albright was quite  
17 clear at the time she held no public capacity in her position. So I  
18 object under hearsay, and we were not provided notice for the hearsay  
19 catch-all rule and, therefore, object to its admissibility. However,  
20 proffer, that if it is admitted then there are significant portions  
21 of the 9/11 Report, statements of the President, et cetera, regarding  
22 the issue of when the war begin that we will want to put into  
23 evidence.

1 MJ [CAPT ALLRED]: Okay. Well, I see a very long statement.  
2 They are numbered. There are 23 pages.

3 CTC [MR. TRIVETT]: Yes, sir.

4 MJ [CAPT ALLRED]: What is this being offered for?

5 CTC [MR. TRIVETT]: Specifically, sir, through the defense case  
6 in chief, through Professor Geoffrey Corn and on a lesser extent  
7 Ms. Gaskins' testimony that there's some indication that, at least  
8 according to Professor Corn specifically, that although al Qaeda  
9 attacked the embassies, if I'm--I'm going to try to summarize his  
10 testimony the best I can. If they attacked the embassies, that  
11 wasn't necessarily an indication of an armed conflict, although once  
12 we fired our missiles back, he said that it would. He then opined  
13 that the armed conflict would then be over.

14 We believe that he misrepresented--not intentionally, but  
15 was probably not competent to testify in regard to the United States'  
16 response following the missile strikes of 21 August 1998.

17 Former Secretary Albright makes very clear all of the  
18 administration's reactions to that missile strike or to the bombing  
19 of the embassies specifically in regard to putting submarines at  
20 launch depth, deploying them, trying to actively target Usama bin  
21 Laden, potentially putting special forces in there to either kill or  
22 capture him, and that they had looked at this as both a dual law  
23 enforcement and military role.

1 MJ [CAPT ALLRED]: Okay.

2 CTC [MR. TRIVETT]: And I think one of the quotes that she gave  
3 specifically was: After all, when we fired missiles, it wasn't for  
4 the purpose of serving legal papers.

5 That's in there, and we think it's an important part for  
6 the jury to understand, because we do believe at this point the  
7 members have a misconception as to how we reacted; that after we hit  
8 the button and fired the missiles; that is all we did, and we weren't  
9 actively targeting or involved in an armed conflict anymore. We  
10 think that's a misrepresentation of an historical fact. I don't  
11 think that there's any reason to believe that there's anything in  
12 that statement that's unreliable. It's a former Secretary of State.

13 MJ [CAPT ALLRED]: So it's offered to prove the truth of the  
14 matter asserted.

15 CTC [MR. TRIVETT]: Yes, sir.

16 MJ [CAPT ALLRED]: That we did put missiles--submarines at  
17 launch depth, and positioned military forces, whatever she says.

18 CTC [MR. TRIVETT]: Absolutely, sir.

19 MJ [CAPT ALLRED]: Okay. The objection is hearsay.

20 CTC [MR. TRIVETT]: Yes, sir.

21 MJ [CAPT ALLRED]: What's your response?

22 CTC [MR. TRIVETT]: Our response specifically is there's no way  
23 that the prosecution can anticipate every issue that the defense puts

1 in for its rebuttal case. Had we known specifically that Professor  
2 Corn was going to testify regarding the armed conflict----

3 MJ [CAPT ALLRED]: I mean this is a plea for mercy. The  
4 objection is hearsay, and I'm asking, what hearsay objection do you  
5 want me to find applicable here?

6 CTC [MR. TRIVETT]: I'm sorry; I misunderstood your question,  
7 sir. It's an official public document. Whether she was the  
8 Secretary of State at the time or not, it is within the archives of  
9 the 9/11 Commission Report Web site. It was a public hearing in  
10 which they took testimony from several different people, to include  
11 the former Secretary of Defense. As a public document, it would fall  
12 under the public documents exception and it would be admitted into  
13 evidence as such, not being hearsay, or at least being an exception  
14 to the hearsay rule.

15 MJ [CAPT ALLRED]: Okay. Let's look at the rule for public  
16 documents then.

17 Okay. Your position is Rule 803(8), public records and  
18 reports. Is that right? Is the 9/11 Commission then the source of  
19 this document?

20 CTC [MR. TRIVETT]: Yes, sir. The 9/11 Commission itself. My  
21 understanding is that that statement is not within the 9/11 Report,  
22 but that they took testimony and evidence and considered other things  
23 in drafting it.



1 MJ [CAPT ALLRED]: Is the 9/11 Commission a public office or  
2 agency?

3 CTC [MR. TRIVETT]: Yes, sir. It's a bipartisan committee  
4 authorized by Congress and the President.

5 CDC [MR. SWIFT]: I would like to speak to this, Your Honor, in  
6 that I think it's extremely significant that it's not within the 9/11  
7 Report. They took testimony, they took parts, and they decided what  
8 to put in the report. That's the report of the agency, not  
9 everything that they considered, not statements made by persons, et  
10 cetera. And it is noteworthy here that when Madeleine Albright made  
11 that statement, she was in her private capacity. So she would not  
12 fall within it in that it was not included into the report, which is  
13 I believe my co-counsel said is some thousand and some pages, but  
14 they did not include her statement.

15 So, it is not a report of the government agency. And what  
16 the government tries to do is bootstrap it because it was presented  
17 to them and it is not part of their official reports.

18 MJ [CAPT ALLRED]: Okay. Well, the exception applies to  
19 records, reports, statements, or data compilations in any form of  
20 public offices or agencies setting forth the activities of the office  
21 or agency, or matters observed pursuant to duty imposed by law.

22 Okay. Final arguments?

1           CTC [MR. TRIVETT]: The prosecution would just ask that it be  
2 put into evidence and shown to the members.

3           MJ [CAPT ALLRED]: Mr. Swift?

4           CDC [MR. SWIFT]: And, again, holding part that the exception  
5 applied--would apply to the report itself. It doesn't reply to all  
6 the activities. We get to an exception that breaks the rule that  
7 says that we will now admit statements made by persons to that  
8 activity. There's no showing that it was part of the official  
9 testimony other than it was provided, was not put into the records  
10 themselves, and, therefore, is not part of the official record.

11          MJ [CAPT ALLRED]: Okay. I'll sustain the objection.

12          CDC [MR. SWIFT]: Thank you, Your Honor.

13          MJ [CAPT ALLRED]: I will give Prosecution Exhibit 146 for  
14 identification to the court reporter as an exhibit offered but not  
15 admitted.

16                 Anything else for the government?

17          CDC [MR. SWIFT]: The prosecution rests its case, sir.

18          MJ [CAPT ALLRED]: Thank you, sir. Let's call the members back  
19 into the courtroom.

20          DC [LCDR MIZER]: Sir, may we take up one issue with respect to  
21 argument?

22          MJ [CAPT ALLRED]: Sure.

23          DC [LCDR MIZER]: Just very briefly.

1           Your Honor, yesterday I think it was raised during the  
2 cross-examination of our two principal witnesses that Mr. Hamdan had  
3 not been helpful before arriving at Bagram Air Base on 28 December  
4 2001. And we would ask the government not be permitted to make this  
5 argument in front of the members, aside from the questions that  
6 they've already asked, given the fact that they haven't told us where  
7 Mr. Hamdan was between 2 December and 28 December of 2001. We still  
8 have no idea now that we've heard all the evidence where Mr. Hamdan  
9 was.

10           We have not objected to them commenting on Mr. Hamdan's  
11 election to remain silent or an election to decline to provide  
12 information because, as we understand it, the Fifth Amendment, that  
13 right does not apply to Mr. Hamdan in his present situation. But we  
14 think it's unfair to allow the government to argue that he was not  
15 cooperating and we have no idea what Mr. Hamdan was doing during that  
16 roughly 30-day period.

17           MJ [CAPT ALLRED]: Does the government intend to make that  
18 argument?

19           TC [LCDR STONE]: The government will make the argument with  
20 regards to Sergeant Major A, [REDACTED], the capture video. And  
21 between other periods of time, it's not argued nor will we be  
22 advancing the arguments regarding it. So I don't see where we really  
23 have an issue.

1           DC [LCDR MIZER]: And, Your Honor, we have no issue with the  
2 Takteh-Pol video and the government arguing what took place in  
3 Takteh-Pol. What I'm concerned about is he didn't give you  
4 actionable intelligence until such and such date. But we don't know  
5 what happened.

6           TC [LCDR STONE]: Well, no. They have been provided, all  
7 statements by the accused, sir.

8           DC [LCDR MIZER]: No, that's not true.

9           MJ [CAPT ALLRED]: I think that's a fair request from the  
10 defense. There was a black hole, and I will sustain that objection,  
11 I guess, to the extent that it's an objection, arguing that he didn't  
12 provide any helpful data when we don't know where he was or what he  
13 provided.

14          TC [LCDR STONE]: Well, we did file a 505 motion in which the  
15 statements by the accused that were taken were provided to the  
16 defense.

17          MJ [CAPT ALLRED]: All right. Maybe I don't remember that.

18          DC [LCDR MIZER]: Your Honor, we haven't seen the documents.  
19 We've seen unclassified summaries.

20          MJ [CAPT ALLRED]: Okay. You guys remind each other of what  
21 you've shown each other over the weekend, and we can take this up  
22 Monday morning when we discuss finally on the record the instructions

1 before we have closing argument. If there's still an issue, I will  
2 resolve it then.

3 TC [LDCR STONE]: Your Honor, do you contemplate a hearing to  
4 argue instructions? Or are you----

5 MJ [CAPT ALLRED]: Yes. I was planning to ask the members to  
6 come back 9:00 or 9:30 on Monday morning. We could resume at 8:30.  
7 And I plan to meet with you over the weekend, actually, as well to  
8 look at the instructions in draft form and informally work out  
9 differences. Sound fair enough?

10 CDC [MR. SWIFT]: Yes, Your Honor.

11 MJ [CAPT ALLRED]: 9:30 Monday morning for them, 8:30 for us?

12 CDC [MR. SWIFT]: Yes, sir.

13 MJ [CAPT ALLRED]: Okay. Good. Why don't you call the members  
14 back in then?

15 **[The R.M.C. 803 session terminated and the military commission**  
16 **commenced at 1027, 1 August 2008.]**

17 BAILIFF: All rise. **[All persons did as directed, and the**  
18 **members entered the courtroom.]**

19 MJ [CAPT ALLRED]: Thank you. Please be seated. **[All persons**  
20 **did as directed.]**

21 Members of the court, that completes the presentation of  
22 the evidence from both sides in this case. What we initially

1 expected would take three weeks has taken two. So, we are a week  
2 ahead of where we thought we would be.

3 At this point, I will release you for the weekend. It will  
4 take me several hours to write the instructions that I will give you  
5 on Monday morning with respect to the law that you must apply in this  
6 case. You won't need to take notes when I read those instructions,  
7 but it will probably take me an hour to read them, and then I will  
8 give you a copy to take with you into your deliberations.

9 Juror number 13, you were the alternate juror as I recall.  
10 At this point, you are excused from further participation in this  
11 case. If you want to catch the plane home tomorrow, it appears that  
12 we will be able to reassemble on Monday morning with the six primary  
13 jurors. We only need five to begin and complete deliberation, so at  
14 this point I think we can safely say we won't require your further  
15 services. If you don't have anything going back home and you want to  
16 stick around Guantanamo for another week and see how this thing  
17 shakes out, I'm not sending you home. I'm excusing you, if you would  
18 like to go. But you won't be included in the deliberations because  
19 you are an alternate and we won't need you. But I do thank you for  
20 your attention and your participation during the last two weeks the  
21 presentation of evidence.

1           I would like to ask you to return to the courtroom at 9:30  
2 Monday morning. Counsel and I will meet at 8:30 and we will try to  
3 resolve all the final matters that might be pending.

4           When you return at 9:30, I envision giving you my  
5 instructions on the law, and I will invite counsel for both sides to  
6 give their closing arguments. And that will probably take a couple  
7 hours, maybe, until the lunch break. I envision you being able to  
8 begin your deliberations on Monday afternoon. At that point, we will  
9 wait until you are ready. You take as long as you want.

10           Now, once again, since you're leaving for the weekend, I  
11 would like to talk about the possibility that you might have SECRET  
12 notes in your notebooks. If you're going to take those notes home  
13 with you, please leave here whatever pages you've copied SECRET notes  
14 on to. And if you want to leave all your notes here, they will be  
15 secured by the court reporter.

16           I would ask you not to discuss the case amongst yourselves  
17 or with anyone else until you have heard my instructions, you have  
18 heard the arguments of counsel, and are in your deliberation room and  
19 can deliberate together.

20           Are there any questions, Mr. President?

21           PRESIDENT: No, sir.

22           MJ [CAPT ALLRED]: Thank you very much. We will excuse the  
23 members then until Monday morning at 9:30.

1           BAILIFF: All rise. [All persons did as directed, and the  
2 members withdrew from the courtroom.]

3 [The military commission terminated and the R.M.C. 803 session  
4 commenced at 1033, 1 August 2008.]

5           MJ [CAPT ALLRED]: Please be seated. [All persons did as  
6 directed.]

7           Okay. I will be working on the instructions for the  
8 members this weekend. And I will wait--I'm waiting for some  
9 documents from both sides so I can address the motion regarding Mr.  
10 Hamdan's confinement. And I propose tomorrow evening sometime that  
11 we get together and have a discussion of the instructions. I will  
12 try to get you a draft this evening or early in the morning to look  
13 over. Okay? So why don't you just--why don't we say tomorrow at  
14 1700 we will meet for discussion. Will that work? Okay. Court is  
15 in recess.

16 [The R.M.C. 803 session recessed at 1034, 1 August 2008.]

17                           [END OF PAGE]



1 [The military commission was called to order at 0838, 4 August 2008.  
2 All parties present when the commission recessed were once again  
3 present.]

4 MJ [CAPT ALLRED]: Court is called to order. The light is  
5 already flashing. Apparently I was getting too close to classified  
6 information there and I needed to be reigned in a little bit.

7 Okay. During the weekend, we did a great deal of work on  
8 the instructions that I will give the members this morning, had a  
9 long and detailed meeting on Saturday afternoon. Both parties  
10 provided very helpful and well-researched proposed instructions and I  
11 have given now both parties the proposed instruction I plan to give.  
12 But nobody came by this morning with final corrections or comments---  
13 -

14 CTC [MR. TRIVETT]: Yes, sir.

15 MJ [CAPT ALLRED]: ----so I guess we're pretty close, but are  
16 there things you want to perhaps bring to my attention before we----

17 CTC [MR. TRIVETT]: Yes, sir, there are.

18 MJ [CAPT ALLRED]: Okay.

19 CTC [MR. TRIVETT]: Specifically, the prosecution had concerns  
20 about three of the instructions. The first one being the definition  
21 for material support or resources.

22 MJ [CAPT ALLRED]: Uh-huh.

1           CTC [MR. TRIVETT]: It doesn't seem to be directly from the  
2 manual and neglects to include personnel, which is obviously one of  
3 the important----

4           MJ [CAPT ALLRED]: Okay. Well, that might have just been a  
5 scrivener's error. Let's see. It's not directly from the manual?

6           CTC [MR. TRIVETT]: Correct, sir.

7           MJ [CAPT ALLRED]: What page are we on?

8           CTC [MR. TRIVETT]: Page 11, sir. But it might--it might show  
9 up prior to that, as well. But it's in the definition of material  
10 support and resources.

11          MJ [CAPT ALLRED]: All right. Well, that sounds like an error  
12 that can easily be corrected. Okay. Good catch. I'll change that.  
13 Maybe I just didn't get it all typed in there properly. Okay. What  
14 else?

15          CTC [MR. TRIVETT]: All right. In regard to the definition of  
16 "in the context of and associated with armed conflict"----

17          MJ [CAPT ALLRED]: Uh-huh.

18          CTC [MR. TRIVETT]: ----we believe that the definition that's  
19 put forth primarily, you know, from the defense, conflates the  
20 principles of direct engagement in hostilities with that of actions  
21 taken in the context of and associated with armed conflict. We  
22 believe that the second standard is a far broader standard that  
23 doesn't require direct participation in the hostilities or even

1 geographic proximity to the hostilities. We think that it conflates  
2 two different processes. We cite to Section 948a(A) of the Manual--  
3 of the Military Commissions Act specifically, to show that Congress  
4 clearly intended the two standards to be different.

5 MJ [CAPT ALLRED]: I agree that they are different. The  
6 question is: What instruction is correct to give to the members? And  
7 the defense proposed something that I thought was pretty close and  
8 that didn't have--948a?

9 CTC [MR. TRIVETT]: Yes, sir.

10 MJ [CAPT ALLRED]: There is not a definition here of that term.  
11 What changes are you proposing to the draft instruction?

12 CTC [MR. TRIVETT]: The prosecution's--the prosecution believes  
13 that the members can look just at the term "in the context of and  
14 associated with armed conflict." It doesn't have any specific terms  
15 that have not already been defined for them, the "armed conflict"  
16 being the only one that requires a definition or a legal definition.  
17 They simply must make a determination that the accused's action was  
18 part of a larger war effort as opposed to a direct participation in  
19 the hostilities. Not every one of the accused's actions that he took  
20 was necessarily part of the war effort.

21 MJ [CAPT ALLRED]: Uh-huh.

22 CTC [MR. TRIVETT]: But they must just be able to determine that  
23 the ones that we have alleged, in fact, are. So we would----

1 MJ [CAPT ALLRED]: So you prefer that I give no instruction  
2 other than that definition?

3 CTC [MR. TRIVETT]: Other than that--yes, sir.

4 MJ [CAPT ALLRED]: Other than----

5 CTC [MR. TRIVETT]: Other than in the context of and associated  
6 with an armed conflict, "armed conflict" having been defined earlier  
7 in the instructions.

8 CDC [MR. MCMILLAN]: Your Honor, the defense would offer a  
9 comment if appropriate or----

10 MJ [CAPT ALLRED]: Uh-huh. Sure.

11 CDC [MR. MCMILLAN]: Your Honor, we think the instruction, as  
12 set forth in your current iteration, is correct. That language was  
13 purposefully chosen as an element of each of the offenses. That in  
14 the context of and associated with were deliberately intended to be  
15 criteria and were not wholly redundant and superfluous, and it's just  
16 a standard doctrine of statutory construction not to render words  
17 superfluous.

18 The authority that we cited to the Court in our proposed  
19 instruction was drawn from other law of war tribunals, such as the  
20 international criminal tribunal for the former Yugoslavia, the Tadic  
21 case and so forth, where there is authority set out in some of the  
22 reported opinions lending--elaborating on what the nexus needs to be

1 between an act and an armed conflict, and we thought that we took a  
2 fairly conservative approach that gave--that gave meaning to this.

3           The--this does not set out the standard in 948a, which I  
4 believe the prosecution is referring to the definition of unlawful  
5 enemy combatant, which references purposefully and materially  
6 supporting hostilities or engaged in hostilities. If anything, that  
7 standard and that definition of unlawful combatant is a higher  
8 standard that scholars recognize as direct engagement in hostilities.  
9 This standard as set forth in your instruction we think is, you know,  
10 it's appropriate as written for the reasons stated.

11         MJ [CAPT ALLRED]: Okay. Well, I'm inclined to leave it in  
12 there. I don't know that it's wrong. I certainly don't intend to  
13 give an instruction that mimics the definition of unlawful combatant.

14         CTC [MR. TRIVETT]: And certainly that's not what the government  
15 is asking for, sir.

16         MJ [CAPT ALLRED]: Uh-huh.

17         CTC [MR. TRIVETT]: We simply--we cited to 948a to show that  
18 there are two distinct different things. Not that you should cite to  
19 948a, but the concern is that when we get into a lot of the specifics  
20 of what they are supposed to or required to find, it very much  
21 narrows the context of the accused's participation. We think that's  
22 just an incorrect standard rule of law. If you look to what's cited  
23 by the defense, one of the sources that they cite is Michael N.

1 Schmidt, "Humanitarian Law and Direct Participation in Hostilities."  
2 That's one of the things that they cite.

3 MJ [CAPT ALLRED]: I read that article over the weekend and I  
4 believe that that was--that was--you're right. That's a good point.  
5 That--that was discussing the concept of direct participation.

6 CTC [MR. TRIVETT]: And the Prosecutor v. Tadic that they have  
7 cited to specifically says they need to be satisfied that each of the  
8 alleged acts was, in fact, closely related to the hostilities.  
9 That's okay. That makes sense. We are comfortable with that.

10 MJ [CAPT ALLRED]: And I chose those words--uh-huh.

11 CTC [MR. TRIVETT]: But we are not comfortable with the fact  
12 that there has to be some type of geographic proximity to the armed  
13 conflict itself. You know, clearly, someone sending war money and  
14 material from the United States to Afghanistan would be engaging in  
15 actions that were in the context of and associated with an armed  
16 conflict if, in fact, they were aware that the money they were  
17 sending were going to be helping al Qaeda in its war against America.  
18 There would be no geographic proximity at all, necessarily.

19 MJ [CAPT ALLRED]: Well, the instruction says "conduct of the  
20 accused that occurs at a distance from the area of the conflict can  
21 still be in the context of and associated with armed conflict as long  
22 as it was closely and substantially related to hostilities."

23 CTC [MR. TRIVETT]: Yes, sir.

1 MJ [CAPT ALLRED]: Doesn't that give you what you want?

2 CTC [MR. TRIVETT]: It does, but it seemingly contradicts

3 something earlier in the definition, sir.

4 MJ [CAPT ALLRED]: Uh-huh.

5 CTC [MR. TRIVETT]: Where it says that you may consider at a

6 place in which the armed conflict is under way. It seems to be at

7 odds with itself, the definition.

8 MJ [CAPT ALLRED]: Okay.

9 CTC [MR. TRIVETT]: Which is why we would request that that--

10 that the geographic proximity just be stricken completely because we

11 don't think it's required.

12 CDC [MR. MCMILLAN]: It appears earlier as a factor and then

13 it's qualified appropriately in your final sentence, Your Honor.

14 MJ [CAPT ALLRED]: Well, I see what you're trying to point out.

15 It does seem to be internally inconsistent----

16 CTC [MR. TRIVETT]: Yes, sir.

17 MJ [CAPT ALLRED]: If the only two criteria are the phrase "at a

18 place in which armed conflict is under way" and the last sentence,

19 which suggests that it doesn't have to be at a place in which armed

20 conflict is under way. What I intended to do is list a number of

21 criteria like I had done for the definition of armed conflict itself.

22 That would help them determine whether it took place in the context

23 of an armed conflict. Okay. Let's see.

1           So the criteria I have drafted include whether the acts of  
2 the accused occurred during the period of an armed conflict. That's  
3 clearly required.

4           CTC [MR. TRIVETT]: Yes, sir.

5           MJ [CAPT ALLRED]: Okay. As defined above. "At the place in  
6 which armed conflict is under way," you have a problem with that  
7 language?

8           CTC [MR. TRIVETT]: Yes, sir.

9           MJ [CAPT ALLRED]: Were performed while the accused acted on  
10 behalf of or under the authority of a party to the armed conflict?

11          CTC [MR. TRIVETT]: I don't think there's a concern in this case  
12 about that.

13          MJ [CAPT ALLRED]: Okay. Whether they constituted or were  
14 closely and substantially related to hostilities occurring during the  
15 armed conflict.

16          CTC [MR. TRIVETT]: There was no problem with that either.

17          MJ [CAPT ALLRED]: Okay. So your only problem with this whole  
18 sentence is "at a place in which armed conflict is under way."

19          CTC [MR. TRIVETT]: Yes, sir. Our first position would be that  
20 we think they need no definitions other than the definition of armed  
21 conflict to make the determination if it was in the context of and  
22 associated with. But that being said, if you feel the need to give



1    them further instructions, those are the two instructions that we  
2    would request be excised.

3           MJ [CAPT ALLRED]:   Two?

4           CTC [MR. TRIVETT]:   Well, the two:   the geographic proximity  
5    issues within that definition.

6           MJ [CAPT ALLRED]:   Well, the second reference to geographic  
7    proximity gives you the ability to argue that something that occurs  
8    at a distance from the area of conflict can still be in the context  
9    of. Isn't that what you want?

10          CTC [MR. TRIVETT]:   Absolutely.   We want the ability to argue  
11   that.   We feel we have the ability to argue that regardless of  
12   whether or not that's in there.

13          MJ [CAPT ALLRED]:   Okay.

14          CTC [MR. TRIVETT]:   There's nothing incorrect about keeping that  
15   in there, but two in there are----

16          MJ [CAPT ALLRED]:   Okay.   I'll delete then the phrase "at a  
17   place in which armed conflict is under way," because there is another  
18   reference to the proximity to the armed conflict that allows both  
19   sides to argue their positions.   Okay.   What's your third comment on  
20   the instructions?

21          CTC [MR. TRIVETT]:   Regarding the judicial notice of the Taliban  
22   -----

23          MJ [CAPT ALLRED]:   Uh-huh.

1           CTC [MR. TRIVETT]: ----and whether or not that's relevant or  
2 required at this point based on the fact that, at least as of now,  
3 the affirmative defense is not being instructed upon.

4           MJ [CAPT ALLRED]: Well, okay. So you're saying if I don't give  
5 the affirmative defense instruction that there's no need for judicial  
6 notice?

7           CTC [MR. TRIVETT]: Yes, sir, seemingly. Well, it's confusing  
8 if it's not related to a prior case.

9           MJ [CAPT ALLRED]: Well, I don't know. I think the defense  
10 still needs the ability to argue several of their theories of the  
11 case, including the possibility that Mr. Hamdan intended to deliver  
12 the missiles to the Taliban, that they were a lawful fighting force,  
13 and that therefore it wasn't an intent to support international  
14 terrorism, which is driving missiles to the front. So I'm going to  
15 leave that in there for whatever purposes it may serve, even if I  
16 don't give the affirmative defense instruction. I think the defense  
17 needs to have the ability to make that argument.

18          CTC [MR. TRIVETT]: Yes, sir.

19          MJ [CAPT ALLRED]: Those are the three points raised by the  
20 government?

21          CTC [MR. TRIVETT]: Yes, sir.

1 MJ [CAPT ALLRED]: Well, you are absolutely right on the first  
2 one. You got what you wanted on the second one and you lost on the  
3 third one. I'd say that's batting pretty good. Okay?

4 CTC [MR. TRIVETT]: Yes, sir. Thank you, sir.

5 MJ [CAPT ALLRED]: Okay. Defense, what are your comments on the  
6 proposed instructions?

7 CDC [MR. MCMILLAN]: Your Honor, the defense also has three  
8 points that it would like to make in way of objection to the current  
9 iteration of the instructions. First, we would just like on the  
10 record the position of the defense that the instruction on armed  
11 conflict that the defense submitted we believe is the correct one.  
12 Admittedly, the instruction that's contained in this iteration goes  
13 some distance, but we believe that the more complete explanation is  
14 as set forth in our own. We do understand the Court is attempting to  
15 balance length of instruction versus other considerations. We are--  
16 we are----

17 MJ [CAPT ALLRED]: I'm trying to make it simple enough for the  
18 members to understand as well. Your proposed instruction on armed  
19 conflict was two single-spaced pages.

20 CDC [MR. MCMILLAN]: Our particular--that's correct, Your Honor.  
21 And we think that it draws the necessary distinction. We understand  
22 the Court's concern. We are particularly focused on the statement in  
23 the instruction regarding statements of political leaders one way or

1 the other, which we think is not an appropriate consideration, but is  
2 more likely to be the result of political propaganda and the  
3 appropriate factors to see whether actual hostilities are under way.  
4 We do want to just make that record.

5 MJ [CAPT ALLRED]: Well, I appreciate all the work you went to.  
6 Your proposed instructions on this point were very, very thorough and  
7 supported by citations to international law scholars that I've read  
8 and that I respect over the weekend.

9 Okay. So I see your very first opening phrase as it's  
10 referenced to objective criteria rather than to policy statements or  
11 political concerns.

12 Well, I mean, in a way, this proposed instruction gives you  
13 the ability to argue one of your central themes.

14 CDC [MR. MCMILLAN]: It does, your Honor.

15 MJ [CAPT ALLRED]: Which is that, the rules of engagement  
16 represent a statement by one of the parties that there was no  
17 conflict.

18 CDC [MR. MCMILLAN]: Absolutely correct, and for that reason,  
19 we're not attempting to state that this is entirely incorrect. It's  
20 --we would like to preserve on the record, however, the position that  
21 we think the proposed instruction from the defense is the more  
22 complete statement of the relevant considerations and focus

1 particularly on that one issue that I mentioned involving political  
2 statements from leadership.

3 MJ [CAPT ALLRED]: So that's the rub then, is the political  
4 statement? Clearly your proposed instruction is more complete than  
5 mine, but I felt like two full pages that distinguish between  
6 international and non-international armed conflict and et cetera was  
7 just too much. Government response to an internal threat that was  
8 more than the members needed. But let's look at the phrase that  
9 particularly bothers you.

10 CDC [MR. MCMILLAN]: It appears about a little more than halfway  
11 down the paragraph: "Statements of the leaders of both sides  
12 indicating their perceptions regarding the existence of an armed  
13 conflict, including the presence or absence of a declaration to that  
14 effect." That is what we would regard as what's most troubling to  
15 the defense about the instructions. We don't think that is a correct  
16 ----

17 MJ [CAPT ALLRED]: You don't think those would be relevant to  
18 determining whether or not there was an armed conflict in place?

19 CDC [MR. MCMILLAN]: They can be relevant in so far as they  
20 indicate whether or not actual hostilities are under way, whether or  
21 not they correctly state facts. But as standing alone, a statement  
22 that we are at war when in fact we're not at war, I would be  
23 concerned that the members might be misled or confused that a mere

1 statement that does not reflect an accurate assessment of the facts  
2 could be deemed sufficient, so----

3 MJ [CAPT ALLRED]: Well, once again, this gives you the ability  
4 to argue yet another of your themes. Okay. I think I'm going to  
5 leave that in there as one of several criteria. And this paragraph,  
6 to be honest, says the parties may argue the existence of other facts  
7 and circumstances. So I want to give both sides the ability to argue  
8 their theories without suggesting the correct answer to the members  
9 and to give you the ability to suggest other factors. So I'll  
10 overrule that objection.

11 CDC [MR. MCMILLAN]: Okay. Thank you.

12 The second objection that we have, Your Honor, is the  
13 defense believes that Mr. Hamdan is entitled to the affirmative  
14 defense instruction on protected status under the Third Geneva  
15 Convention. We understand that the defense has a burden of  
16 introducing or pointing to some evidence in the record in order to  
17 raise that affirmative defense. We believe that there is some  
18 evidence that has come into this record over the past two weeks  
19 sufficient to establish that Mr. Hamdan was a civilian, that he had  
20 authorization to accompany armed forces although, like civilian  
21 contractors in modern armed forces, he didn't necessarily spend a  
22 hundred percent of his time with that armed force.

1           His trips to and from that armed force for purposes of  
2 delivery of weapons has been something highlighted by the prosecution  
3 in the case it's presented. The authorization comes, we believe, in  
4 the form of a weapons permit from the Taliban, which has been  
5 introduced into evidence and which does bear the name, we understand,  
6 of Abu Abdulla, but we understood that the prosecution had presented  
7 evidence suggesting that that was indeed a kunya associated with Mr.  
8 Hamdan. On the back of that document, there is handwritten the word  
9 "Saqr" as well. So we----

10         MJ [CAPT ALLRED]: Okay. I missed that piece of evidence. I  
11 didn't--I don't remember that that name that appeared on the front of  
12 the weapons permit was an alias or whatever you call it----

13         CDC [MR. MCMILLAN]: A kunya.

14         MJ [CAPT ALLRED]: ----that Mr. Hamdan sometimes used. Do you  
15 agree that that's the case? Was that weapons permit issued in Mr.  
16 Hamdan's name?

17         CDC [MR. MCMILLAN]: The testimony came in----

18         MJ [CAPT ALLRED]: My recollection was that his kunya appeared  
19 on the back of that in someone else's handwriting and that this was  
20 actually someone else's weapons permit.

21         CDC [MR. MCMILLAN]: We believe that it was overheard on the  
22 radio, it came in on the testimony of Witness A, that he believed he  
23 was in possession--he had captured an important figure, that Abu

1   Abdulla was--there was a great deal of radio traffic relating to  
2   that, to that individual, and that he was--he believed he had that  
3   individual and----

4           MJ [CAPT ALLRED]: I don't remember that. I guess I do remember  
5   that part of Witness A's testimony, but I don't remember that----

6           CDC [MR. MCMILLAN]: In addition, there is the so-called, what's  
7   been referred to in evidence as the pika note which, in fact, a  
8   translation of which was read into the record by Agent [REDACTED]. That  
9   pika note, though it appears in the record in Arabic as a documentary  
10  exhibit, is a letter from Khallad to Saqr al Jadawi, which requests  
11  the delivery of certain items of ammunition and military  
12  significance. It is undated, but it supports the idea that Mr.  
13  Hamdan is a civilian, is authorized to move material and war supplies  
14  to the Ansars, the Arab dominated force that's integrated with the  
15  Taliban.

16           Accordingly, we think both of those documents represent  
17  written authorization. Admittedly, not in the form of the appendix  
18  attached to the Third Geneva Convention, but the commentary to the  
19  Convention makes it clear that that's not an absolute prerequisite,  
20  that that form be observed. So we think there are two separate  
21  documents that would support authorization to be providing services  
22  to armed forces and that that is the primary thrust of that section



1 of Article IV of the GPW; and that there is some evidence in the  
2 record which would permit that instruction to be issued.

3 CDC [MR. SCHNEIDER]: Your Honor, I can at least speak to any  
4 questions regarding the direct of Witness A. There was no testimony  
5 elicited that Abu Abdulla was a kunya of the accused. However, it is  
6 true that he did say that "Saqr" was written on the back of the  
7 document. However, Witness A was unable to actually attach or  
8 connect "Saqr" even with Saqr al Jadawi. In fact, I attempted to  
9 elicit that from the witness and he pretty much refused to take that  
10 extra step, so I don't believe that that evidence is in the record.

11 CDC [MR. MCMILLAN]: Well that----

12 MJ [CAPT ALLRED]: See, I guess the other problem I have with  
13 this is, as I read Article IV of the Third Geneva Convention, I see  
14 it describing people who are semi-permanently or permanently  
15 accompanying the armed forces, and the examples they give are  
16 contractors, members of aviation crews, people who provide services  
17 on an ongoing basis, and that they are actually civilians who  
18 accompany the armed forces and are--that's kind of their primary  
19 employment. They're paid for that.

20 Now, the evidence as I remember it is that Mr. Hamdan was  
21 paid by bin Laden personally, not even by al Qaeda perhaps, and that  
22 he had made occasional trips to deliver weapons to various people,

1 including the Taliban, but I just never--I don't see any evidence  
2 that he was a civilian accompanying the armed forces, so ...

3 CDC [MR. MCMILLAN]: We didn't think that the--the third Geneva  
4 Convention, Article IV, imposed any duration requirement in terms of  
5 long service with the armed forces. That wasn't present in any of  
6 the authorities we looked at. I understand and believe the Court has  
7 correctly summarized the evidence on this point, but we are not--the  
8 defense wouldn't support the establishment of a sort of duration of  
9 service requirement for the benefit of that protected status. In  
10 fact, the thrust of the Geneva Convention is to err on the side of  
11 inclusion in these situations to extend protection rather than to  
12 strictly read the text to limit it.

13 MJ [CAPT ALLRED]: Okay. Well, that's a fair point.  
14 Commander Stone.

15 TC [LCDR STONE]: Yes, sir. However, if you take the defense's  
16 point with regards to what they were just talking about with regards  
17 to Geneva having an open-ended or a non--as you said, the fact that  
18 the accused or anyone else could be a contractor as its primary  
19 purpose, that is the purpose of GC III. To read it otherwise as the  
20 defense is saying, that you could move in and out of the status as a  
21 civilian--I mean, that's what makes him in part an unlawful  
22 combatant, because he's moving from--as a civilian unlawful combatant  
23 distinction, by reading it the way that the defense wants you to read

1 it, you blur the line to the point that there's no distinction  
2 between those things in GC IV A(a)(4) as under the civilian  
3 contractor.

4 I mean, if you read it the way the defense really is  
5 pushing you to read it, then there is no distinction between those  
6 individuals that are truly protected, your supply contractors, your  
7 aviation mechanics, et cetera, with the individual that--well, today  
8 I'm going to be a supply contractor and tomorrow I'm not. So how  
9 they're asking you to interpret it is really fundamentally wrong with  
10 regards to the way it's set up, underlying prediction--or protections  
11 enunciated by Geneva, and because of that, you really can't stretch  
12 it to the point,--because what the defense wants you to do is really  
13 break that to the point where it doesn't exist. Geneva is put in  
14 place fundamentally to protect that class of people, the accused--  
15 and there's been no evidence to suggest that he would fit in any way  
16 under that category. So the prosecution's position is in agreement  
17 with what your original decision of not issuing the affirmative  
18 defense.

19 CDC [MR. MCMILLAN]: Your Honor, just very briefly, if I can  
20 respond. That was a very important point and I think it was flat  
21 wrong. We are not contending that Mr. Hamdan was a combatant. He was  
22 a civilian. The--the instruction we suggest does not blur the line  
23 between combatants and civilians, which it is the primary focus of

1 the law of war to maintain a sharp, sharp division between combatants  
2 and civilians. However, looking at Article IV of the Geneva  
3 Convention, it is explicit that two out of the six categories of  
4 protected persons are civilians--can be civilians. So this does not  
5 blur the line between combatant and civilian. Affording individuals  
6 protected status under Article IV can be afforded to civilians, as in  
7 this instance, without blurring that all-important line.

8 MJ [CAPT ALLRED]: Okay. I'm going to deny the defense the  
9 affirmative defense. I just don't see any evidence in the record  
10 that Mr. Hamdan was a person who accompanied the armed forces. It's  
11 true that he visited the armed forces from time to time, but in fact  
12 he was primarily an employee of al Qaeda or of Mr. bin Laden. I don't  
13 find any evidence in the record that he had received authorization  
14 from the armed forces to accompany them.

15 What he had, if it was issued in his name and if it  
16 belonged to him, was a small arms permit that allowed him to carry a  
17 handgun or something, so that he could present it to Taliban  
18 authorities when he was stopped and that he wouldn't be bothered by  
19 the Taliban authorities. The fact that the permit, even if it is  
20 issued in his name, doesn't comply with the format of the Geneva  
21 Conventions I agree with the defense is a matter of no significance.  
22 So this affirmative defense that you requested pertaining to  
23 Specifications 3 and 4 under Charge II, which involved the

1 transportation of weapons, the surface to air missiles--and I don't  
2 believe you have raised the defense.

3 CDC [MR. MCMILLAN]: There is one final objection we would like  
4 to place on the record, Your Honor.

5 MJ [CAPT ALLRED]: Uh-huh.

6 CDC [MR. MCMILLAN]: It's one I alluded to earlier in an 802,  
7 and it is the objection that bodyguard services can be included as  
8 among the material support for terrorism or a terrorist organization.  
9 The phrase "bodyguard services" does not appear in the definition of  
10 "material support" or "resources" in the Manual for Military  
11 Commissions. Admittedly, the definition that does appear references  
12 any property or service. We rely, however, on federal case law which  
13 stands for the proposition that in interpreting the material support  
14 statute under the U.S. domestic code, which is substantially similar,  
15 it's been held that the enumeration of items or services must be  
16 complete, must be deemed all-inclusive rather than open-ended, in  
17 order to comply with a principle of notice required in order to  
18 impose criminal penalties for conduct, and we would request then that  
19 Specifications 7 and 8 of the second charge, the material support  
20 charge as relating to bodyguard services, be deleted from the  
21 instruction and the charge sheet.

22 MJ [CAPT ALLRED]: You're asking me to dismiss those  
23 specifications or just not to instruct upon them?

1 CDC [MR. MCMILLAN]: Well, to dismiss them for the reason that  
2 there is not adequate notice under the term "material support or  
3 resources."

4 MJ [CAPT ALLRED]: I do remember you bringing that to my  
5 attention on Saturday afternoon. And although you cited some cases  
6 to me, I don't think I found those cases. I read the ones that you  
7 gave me copies of and I guess I just moved on without remembering to  
8 look for those.

9 Government, what's your reaction? Have you read these  
10 cases?

11 CTC [MR. TRIVETT]: Sir, we haven't read the cases. The  
12 prosecution's position, though, is that bodyguard services would fall  
13 specifically under the expert assistance prong of material support.  
14 I mean, he was clearly trained in order to--how to protect Usama bin  
15 Laden. There was a lot of testimony on the record to suggest that  
16 they trained in the convoys and they did different tactical evasive  
17 maneuvers; that this was not something that could have just been done  
18 by a layman but, in fact, that he was a trained bodyguard and driver  
19 for the protection of Usama bin Laden. So we think that it would  
20 fall clearly under that prong within the definition, expert  
21 assistance.

22 MJ [CAPT ALLRED]: Okay. Well, do you have those cases readily  
23 at hand? Did you already cite them in your draft instruction?

1 CDC [MR. MCMILLAN]: We did cite them in the draft instructions.  
2 I believe it's set out in the Humanitarian Law Project cases of the  
3 9th Circuit Court of Appeals. There's a series of them.

4 MJ [CAPT ALLRED]: And those refer to the term, the general term  
5 "services"?

6 CDC [MR. MCMILLAN]: They refer to the proposition that the list  
7 set forth in the statute should be deemed all-encompassing, or a  
8 complete and exhaustive list, rather than being open-ended, in order  
9 to protect the sort of due process rights of notice about conduct  
10 that could be deemed criminal.

11 MJ [CAPT ALLRED]: Okay. What--do they address language such as  
12 expert advice or assistance?

13 CDC [MR. MCMILLAN]: There are cases that do address expert  
14 advice, and my recollection is that that has been held to be  
15 unconstitutionally vague and void for vagueness, because it could, in  
16 fact, embrace things as widespread as or as necessary as providing  
17 expert legal services.

18 MJ [CAPT ALLRED]: Okay. Well, why don't you bring to me the  
19 cases that you want me to read before the members assemble at 9:30,  
20 and we'll see if we can sort this out one way or the other. In the  
21 meantime, that's all the defense's challenges to the instructions as  
22 written?

23 CDC [MR. MCMILLAN]: Yes, sir.

1 MJ [CAPT ALLRED]: Now, remind me what was the first one? Did I  
2 agree to make a change for you?

3 CDC [MR. MCMILLAN]: The first one related to the definition of  
4 armed conflict and no, you did not.

5 MJ [CAPT ALLRED]: Okay. I think since that's one of many  
6 factors, it's fair enough. Matter of fact, with respect to the draft  
7 language on the context and associated with armed conflict, I think  
8 I'll add the phrase "and other facts and circumstances that the  
9 parties might argue," so that you can roam around in that territory  
10 and make whatever argument you wish.

11 Okay. I will go make these changes I have agreed to make.  
12 I'll wait for the defense to bring me whatever cases it specifically  
13 wants me to read with respect to expert advice or services, and we'll  
14 plan to return at 9:30 to----

15 CDC [MR. SWIFT]: Do we want to go over it right now, sir,  
16 before you, the findings worksheet, and if there's any issues or so -  
17 -issues with it?

18 MJ [CAPT ALLRED]: I did receive a findings worksheet this  
19 morning and I was told that the defense had no objections to it.

20 CTC [LCDR STONE]: I actually only have one point, and it's a  
21 minor one. Looking at Specification 2--and I discussed this with  
22 counsel--Specification 2 of Charge I, I'm really not sure how you



1 could have an exception and substitution as it's drafted and still be  
2 guilty.

3 And with respect to----

4 MJ [CAPT ALLRED]: I didn't bring my copy of the charge sheet to  
5 the bench. Did you discuss this with counsel?

6 TC [LCDR STONE]: We did.

7 MJ [CAPT ALLRED]: What would the members possibly except or  
8 substitute in Charge II or Specification 2?

9 TC [LCDR STONE]: Well, I think that they----

10 CDC [MR. SWIFT]: Charge I, Specification 2.

11 MJ [CAPT ALLRED]: Uh-huh.

12 TC [LCDR STONE]: I think they could, in fact, except out the  
13 words "Taliban" and based on your--they would probably either need  
14 to--I mean, they could certainly strike out the word "Taliban and he  
15 was, in fact, delivering them to al Qaeda." Not giving them that  
16 opportunity or not striking the words "Taliban" right now, being that  
17 you're giving them the lawful--you know, the defense or the judicial  
18 notice that the Taliban is the lawful government of Afghanistan,  
19 actually, sir, quite frankly could confuse the finding on appeal if  
20 they didn't--if either--if "Taliban" wasn't stricken from the  
21 language now.

22 CDC [MR. SWIFT]: Then in a sense, if we are going to do that,  
23 you know, in the process, you know, then you need to instruct them

1 specifically if they find it to be Taliban, it's not guilty.  
2 Because, you know, you set up a case where they could strike "al  
3 Qaeda," find Taliban, and then find guilty, which would be a verdict,  
4 all or in part, and I think that if we set it up where they  
5 understand in the instruction that they must find that he's  
6 delivering to al Qaeda to be guilty, unless the government's position  
7 is if he's delivering to either he's guilty, in which case----

8 MJ [CAPT ALLRED]: You're talking about the second conspiracy?

9 CDC [MR. SWIFT]: Second conspiracy, sir.

10 MJ [CAPT ALLRED]: Okay, now, is this--is this just a request  
11 for a change to the findings worksheet or a request for a change in  
12 the instructions?

13 CDC [MR. SWIFT]: To the findings. I think the instructions are  
14 fine. The findings worksheet, I'm not sure whether there's an  
15 exception or substitution, and if there is going to be an exceptions  
16 or substitutions on this, it would I think have to indicate that--  
17 well, given the instructions, I'm going to withdraw that. Now that I'm  
18 thinking about it as I'm standing here, I'll withdraw the part and  
19 allow the members to strike that as they please, being, I guess,  
20 there is a way wherein they could find and strike out language.

21 MJ [CAPT ALLRED]: Well, the specification--let's see. See, the  
22 specification says "an agreement with one or more known or unknown  
23 members of al Qaeda or the Taliban," and the instruction as I have it

1 drafted says "entered into an agreement to commit murder in violation  
2 of the law of war." So my sense is that if he entered into an  
3 agreement with one or more known or unknown members, that----

4 CDC [MR. SWIFT]: Yeah, that was the part where I couldn't see  
5 where we would have an exception or substitution, but----

6 MJ [CAPT ALLRED]: Okay. So you have no objections then to the  
7 findings worksheet; is that right?

8 CDC [MR. SWIFT]: That's correct.

9 MJ [CAPT ALLRED]: Okay. Well, I will go back then and take a  
10 final look at the instructions.

11 TC [LCDR STONE]: Sir, I have----

12 MJ [CAPT ALLRED]: Oh, I'm sorry; one more thing?

13 TC [LCDR STONE]: I know it's my proposed findings worksheet,  
14 but I have one objection. One of the--when we took on Charge I,  
15 Specification 1, as we talked on Saturday, by charging in the  
16 conjunctive and proving in the disjunctive--I think one word on the  
17 findings work sheet and it says, after "Saif al Adel," where it says  
18 "and: I think that probably needs to be "or".

19 MJ [CAPT ALLRED]: On the findings worksheet?

20 TC [LCDR STONE]: Yes, sir. If you look at Charge I,  
21 Specification 1.

22 MJ [CAPT ALLRED]: Uh-huh.

1 TC [LCDR STONE]: Where we went ahead and pulled the basic  
2 language of the charge, when it comes to the findings part of it,  
3 "and" should be "or" because it's proving in the disjunctive.

4 MJ [CAPT ALLRED]: Well, the findings worksheet has the same  
5 language as the Specification. I don't care if you change that to  
6 "or" if the defense doesn't care.

7 TC [LCDR STONE]: I think it makes it consistent with----

8 CDC [MR. SWIFT]: We have no objection, Your Honor.

9 MJ [CAPT ALLRED]: Okay.

10 TC [LCDR STONE]: I think it just makes it consistent with all  
11 of the other language.

12 MJ [CAPT ALLRED]: Well----

13 CDC [MR. SWIFT]: The well-established law.

14 TC [LCDR STONE]: And otherwise----

15 MJ [CAPT ALLRED]: Why don't you just make that copy--that  
16 handwritten change to the findings worksheet, and we'll have this  
17 marked as the next appellate exhibit in order. Okay.

18 I'll be in my office and working on the final draft of the  
19 instruction until I hear from counsel and then we'll go forward.

20 **[The military commission recessed at 0919, 4 August 2008.]**

21 **[The R.M.C. 803 session was called to order at 0951, 4 August 2008.]**

22 MJ [CAPT ALLRED]: Court is called to order. I'll give the  
23 court reporter the findings and instructions and ask her to mark

1 those as the next appellate exhibit in order. I'll deliver these to  
2 the members, to the senior member, when they retire to deliberate.

3           During the recess, Mr. McMillan brought me two cases:  
4 Humanitarian Law Project against John Ashcroft from the United States  
5 District Court for the Central District of California, a 2004 case;  
6 and the Humanitarian Law Project against Michael Lucchesi, it looks  
7 like, and his friends, Condoleezza Rice and et cetera, from the Ninth  
8 Circuit. I didn't have time to read these, but I'll take this up  
9 later. This would have been an intriguing motion to argue during our  
10 motions--law motions arguing days, but I don't have time to give it  
11 the attention it deserves right now. If he's acquitted of those  
12 specifications, it will be academic. Or in any event, we can take it  
13 up later.

14           When the members return, I will--do you have my  
15 instructions ready for me, Specialist Chen? I need to read those now  
16 --I'll advise the members of the change to Specifications 3 and 4  
17 under Charge II, and we will be on our way. Anything else before we  
18 call the members?

19           TC [LCDR STONE]: No, sir.

20           MJ [CAPT ALLRED]: Bailiff, please ask the members to enter the  
21 courtroom.

22           DC [LCDR MIZER]: Sir, did you give a copy to the interpreters,  
23 of the instructions?

1 MJ [CAPT ALLRED]: We did.

2 DC [LCDR MIZER]: Okay.

3 MJ [CAPT ALLRED]: There have been slight changes made since the  
4 interpreter got their version, but I think--think they'll be able to  
5 follow along pretty well.

6 BAILIFF: All rise **[all persons did as directed and the members**  
7 **entered the courtroom].**

8 **[The R.M.C. 803 session terminated and the military commission**  
9 **commenced at 0952, 4 August 2008.]**

10 MJ [CAPT ALLRED]: Good morning, members. Please be seated **[all**  
11 **persons did as directed]**. Counsel, members of the gallery, can be  
12 seated.

13 There are only six of you this morning. It looks like our  
14 alternate juror decided to go back to work. That's fine. We have  
15 our primary panel here.

16 Members, if you would take a moment and look at the copy of  
17 the charges that was given to you at the beginning of the case, under  
18 Specifications 3 and 4 of Charge II, these are specifications in  
19 which the accused is charged with providing material support to  
20 terrorism by transporting surface to air missiles. I have granted a  
21 motion for a finding of not guilty as to that specification as  
22 charged and will instruct you instead on the lesser included offense  
23 of attempting to provide material support to terrorism.

1           And so as you look at the specification, please insert the  
2 words "attempt to" before the word "provide" in both Specifications 3  
3 and 4 under Charge II. Very good. It looks like those changes have  
4 been made.

5           I'm going to read you now 19 pages of detailed  
6 instructions. I will give you this copy to take with you into  
7 deliberations when you retire. There's no need to try to keep this  
8 all straight as we go through it.

9           Members of the Court: When you close to deliberate and  
10 vote on the findings, each of you must resolve the ultimate question  
11 of whether the accused is guilty or not guilty based upon the  
12 evidence presented here in court and upon the instructions which I  
13 will now give you. My duty is to instruct you on the law. Your duty  
14 is to determine the facts, apply the law to the facts, and determine  
15 the guilt or innocence of the accused. The law presumes the accused  
16 to be innocent of the charges against him.

17           At the end of my instructions, you will hear an exposition  
18 of the facts by counsel for both sides as they view them. Bear in  
19 mind that the arguments of counsel are not evidence. Argument is  
20 made by counsel in order to assist you in understanding and  
21 evaluating the evidence. But you must base your determination of the  
22 issues in this case on the evidence as you remember it and apply the  
23 law as I instruct you.

1 During the trial, some of you took notes. You may take your notes  
2 with you into the deliberation room and consult them. Your notes are  
3 not a substitute for the record of trial.

4 I will now advise you of the elements of each offense  
5 alleged against the accused.

6 In Specification 1 of Charge I, the accused is charged with  
7 the offense of conspiracy. In order to find the accused guilty of  
8 this offense you must be convinced by legal and competent evidence of  
9 each of the following elements beyond a reasonable doubt:

10 The first element: Between about February of 1996 and  
11 about 24 November 2001, Mr. Hamdan entered into an agreement with  
12 Usama bin Laden, Ayman al Zawahiri, Sheik Said al Masri, Muhammad  
13 Atef, also known as Abu Hafs al Masri, Saif al Adel or various other  
14 members of al Qaeda organization, known or unknown, to commit one or  
15 more of the following substantive offenses triable by military  
16 commission: attacking civilians, attacking civilian objects, murder  
17 in violation of the law of war, destruction of property in violation  
18 of the law of war, or terrorism.

19 The second element is that Mr. Hamdan knew the unlawful  
20 purpose of the agreement and joined willingly with the intent to  
21 further the unlawful purpose.

22 The third element: While this agreement continued to exist  
23 and while Mr. Hamdan remained a party to the agreement, Mr. Hamdan



1 knowingly committed at least one of the following overt acts for the  
2 purpose of bringing about one of the objects of the agreement:  
3 served as a bodyguard for Usama bin Laden; served as a driver for  
4 Usama bin Laden; transported and delivered weapons, ammunition or  
5 other supplies to al Qaeda members and associates; drove or  
6 accompanied Usama bin Laden to various al Qaeda training camps, press  
7 conferences or lectures; or received weapons training in Afghanistan.

8           The fourth element is that this conduct occurred in the  
9 context of and was associated with an armed conflict. Proof that the  
10 offense of attacking civilians, attacking civilian objects, murder in  
11 violation of the law of war, destruction of property in violation of  
12 the law of war, or terrorism actually occurred is not required;  
13 however, it must be proved beyond a reasonable doubt that the  
14 agreement included every element of at least one of the offenses the  
15 government has alleged as objects of the conspiracy.

16           At least four of the six members must agree on the same  
17 object of the conspiracy to find that that conspiracy existed. The  
18 agreement in a conspiracy does not have to be in any particular form  
19 or expressed in formal words. It is sufficient if the minds of the  
20 parties reach a common understanding to accomplish the object of the  
21 conspiracy and this may be proved by the conduct of the parties.

22           The agreement does not have to express the manner in which  
23 the conspiracy is to be carried out, or what part each conspirator is

1 to play. The overt act required for this offense does not have to be  
2 a criminal act, but it must be a clear indication that the conspiracy  
3 is being carried out. The overt act may be done either at the time  
4 of or following the agreement. The overt act must clearly be  
5 independent of the agreement itself, that is it must be more than  
6 merely the act of entering into the agreement or an act necessary to  
7 reach the agreement.

8           You are advised that there is no requirement that all co-  
9 conspirators be named in the specification or that all co-  
10 conspirators be subject to trial by military commission.

11           You will note that more than one overt act has been listed  
12 in Specification 1. You may find Mr. Hamdan guilty of conspiracy  
13 only if you are convinced beyond a reasonable doubt that he  
14 personally committed at least one of the overt acts described in the  
15 specification and that such act was indeed an act in furtherance of  
16 the alleged agreement. Accordingly, if you find beyond a reasonable  
17 doubt that Mr. Hamdan committed one or more such overt acts but not  
18 all of them, your findings should reflect this by appropriate  
19 exceptions.

20           At least four of the members present when the vote is taken  
21 must concur that the accused committed the same overt act. Thus, you  
22 may find Mr. Hamdan guilty of Specification 1 under Charge I if you  
23 find beyond a reasonable doubt that he conspired to do any of the

1 following: Conspiracy to attack civilians would require you to find  
2 beyond a reasonable doubt that Mr. Hamdan entered into an agreement  
3 to intentionally direct attacks against the civilian population as  
4 such, or against individual civilians not taking direct part in  
5 hostilities; that Mr. Hamdan knew or should have known the factual  
6 circumstances that established the civilian status; that Mr. Hamdan  
7 knew the unlawful purpose of the agreement and joined willingly with  
8 the intent to further the unlawful purpose;

9           That Mr. Hamdan committed an overt act in furtherance of  
10 the agreement and that the agreement and the intended act on  
11 civilians took place in the context of and was associated with an  
12 international armed conflict. The intent required for this offense  
13 precludes its applicability with regard to collateral damage or  
14 death, damage, or injury incident to a lawful attack.

15           To find the accused guilty of a conspiracy to attack  
16 civilian objects, you must find beyond a reasonable doubt that Mr.  
17 Hamdan entered into an agreement to intentionally direct attacks  
18 against civilian property, that is property that was not a military  
19 objective; that Mr. Hamdan knew the unlawful purpose of the agreement  
20 and joined willingly with the intent to further the unlawful purpose;  
21 that Mr. Hamdan committed an overt act in furtherance of this  
22 agreement; and that the agreement and the intended attack on civilian  
23 objects took place in the context of and was associated with an

1 international armed conflict. The intent required for this offense  
2 precludes its applicability with regard to collateral damage or  
3 death, damage, or injury incident to a lawful attack.

4 Military objectives are those objects during an armed  
5 conflict which, by their nature, location, purpose or use effectively  
6 contribute to the opposing force's war-fighting or war-sustaining  
7 capability and the total or partial destruction, capture, or  
8 neutralization of which would constitute a definite military  
9 advantage to the attacker under the circumstances at the time of the  
10 attack. Civilian objects are those objects that do not qualify as  
11 military objectives.

12 In order to find Mr. Hamdan guilty of conspiracy to commit  
13 murder in violation of the law of war, you must find beyond a  
14 reasonable doubt that Mr. Hamdan entered into an agreement to  
15 intentionally kill one or more persons in violation of the law of  
16 war; that Mr. Hamdan knew the unlawful purpose of the agreement and  
17 joined willingly with the intent to further the unlawful purpose;  
18 that Mr. Hamdan committed an overt act in furtherance of the  
19 agreement; and that the agreement and the intended murder took place  
20 in the context of and was associated with an armed conflict.

21 A killing violates the law of war where a combatant,  
22 whether lawful or unlawful, intentionally and without justification  
23 kills civilians not taking part in hostilities, military personnel

1 placed *hors de combat* by sickness, wounds or detention, or military  
2 medical or religious personnel.

3 In order to find Mr. Hamdan guilty of conspiracy to destroy  
4 property in violation of the law of war, you must find beyond a  
5 reasonable doubt that Mr. Hamdan entered into an agreement to  
6 intentionally and without consent destroy property of another which  
7 is not a military objective; that Mr. Hamdan knew the unlawful  
8 purpose of the agreement and joined willingly with the intent to  
9 further the unlawful purpose; that Mr. Hamdan committed an overt act  
10 in furtherance of the agreement; and that the agreement and the  
11 intended destruction of property took place in the context of and was  
12 associated with an armed conflict.

13 Military objectives and civilian objects were defined on  
14 page 3. Those definitions apply to this specification as well.

15 In order to find Mr. Hamdan guilty of a conspiracy to  
16 commit terrorism, you must find beyond a reasonable doubt that Mr.  
17 Hamdan entered into an agreement to intentionally kill or inflict  
18 great bodily harm on one or more protected persons, or to engage in  
19 an act that evinces a wanton disregard for human life in a manner  
20 calculated to influence or affect the conduct of government or  
21 civilian population by intimidation or coercion, or to retaliate  
22 against government conduct; that Mr. Hamdan knew the unlawful purpose  
23 of the agreement and joined willingly with the intent to further the

1 unlawful purpose; that Mr. Hamdan committed an overt act in  
2 furtherance of the agreement; and that the agreement and the intended  
3 act of terrorism took place in the context of and was associated with  
4 an armed conflict.

5           In order to be an act of terrorism, the act must be  
6 wrongful. An attack on a military objective undertaken by military  
7 forces of a state in the exercise of their official duties would not  
8 constitute an act of terrorism. Protected persons are civilians not  
9 taking an active part in hostilities, military personnel placed *hors*  
10 *de combat* by sickness, wounds or detention, or military medical or  
11 religious personnel.

12           If you have doubt that any overt act alleged in  
13 Specification 1 was committed or that any overt act was committed in  
14 furtherance of the alleged agreement, you may still reach a finding  
15 of guilty so long as you conclude that Mr. Hamdan committed one of  
16 the alleged overt acts in furtherance of the agreement, and all the  
17 other elements of the offense are proved beyond a reasonable doubt,  
18 but you must modify the specification to correctly reflect your  
19 finding in this regard.

20           Those are the instructions with respect to Charge I,  
21 Specification 1. Do you see in the specification which items are the  
22 overt acts? **[Affirmative response from the members.]**

1 MJ [CAPT ALLRED]: Okay. In Specification 2 of Charge I, the  
2 accused is charged with the offense of conspiracy to commit murder in  
3 violation of the law of war. In order to find the accused guilty of  
4 this offense, you must be convinced by legal and competent evidence  
5 of each of the following elements beyond a reasonable doubt:

6 First, that on or about 24 November 2001, the accused  
7 entered into an agreement to commit murder in violation of the law of  
8 war;

9 Two, that Mr. Hamdan knew the unlawful purpose of the  
10 agreement and joined willingly with the intent to further the  
11 unlawful purpose;

12 Three, that in order to effect the object of the  
13 conspiracy, Mr. Hamdan committed an overt act in furtherance of the  
14 agreement by transporting one or more SA-7 surface to air missiles to  
15 be ultimately used to unlawfully and intentionally kill United States  
16 or coalition service members. Four, that the agreement and the  
17 intended killing took place in the context of and were associated  
18 with an armed conflict.

19 Proof that the offense of murder in violation of the law of  
20 war actually occurred is not required. However, it must be proved  
21 beyond a reasonable doubt that the agreement included every element  
22 of this offense. The agreement in a conspiracy does not have to be  
23 in any particular form or expressed in formal words. It is

1 sufficient if the minds of the parties reach a common understanding  
2 to accomplish the object of this conspiracy. And this may be proved  
3 by the conduct of the parties. The agreement does not have to  
4 express the manner in which the conspiracy is to be carried out or  
5 what part each conspirator is to play.

6           The overt act required for this offense does not have to be  
7 a criminal act, but it must be a clear indication that the conspiracy  
8 is being carried out. The overt act may be done either at the time  
9 of or following the agreement. The overt act must clearly be  
10 independent of the agreement itself; that is, it must be more than  
11 merely the act of entering into the agreement or an act necessary to  
12 reach the agreement.

13           You are advised that there is no requirement that all co-  
14 conspirators be named in the specification or that all co-  
15 conspirators be subject to trial by military commission.

16           The definitions associated with this offense have been  
17 discussed on page four of these instructions. Those definitions also  
18 apply here.

19           In Specification 1 of Charge II, the accused is charged  
20 with providing material support for an act of terrorism. In order to  
21 find the accused guilty of this offense, you must be convinced beyond  
22 a reasonable doubt of each of the following elements:



1           First, between February 19, 1996 and November 24, 2001, the  
2   accused provided material support or resources, to wit, his person  
3   for training, his services as a driver and bodyguard for Usama bin  
4   Laden, and his services transporting weapons or weapon systems to be  
5   used in preparation for or in carrying out an act of terrorism;  
6   second, that he knew or intended that the material support or  
7   resources were to be used for carrying out an act of terrorism;  
8   third, that the conduct took place in the context of and was  
9   associated with an armed conflict.

10           In Specification 2 of Charge II, the accused is charged  
11   with providing material support for an international terrorist  
12   organization. In order to find the accused guilty of this offense,  
13   you must be convinced beyond a reasonable doubt of each of the  
14   following elements: One, between about February 1996 and November  
15   24, 2001, the accused provided material support or resources, to wit,  
16   his person for training, his service as a driver and bodyguard for  
17   Usama bin Laden, and his services transporting weapons or weapon  
18   systems to be used in support of al Qaeda, an international terrorist  
19   organization engaged in hostilities against the United States.

20           Two, that he intended to provide such material support or  
21   resources to al Qaeda, an international terrorist organization  
22   engaged in hostilities against the United States;

1           Three, that he knew that al Qaeda was engaged in or engages  
2 in terrorism;

3           And four, that the conduct took place in the context of and  
4 was associated with an armed conflict.

5           In Specification 3 of Charge III, the accused is charged  
6 with an attempt to provide material support for an act of terrorism  
7 in violation of Section 950(t) of the Military Commissions Act. This  
8 is a lesser included offense of the charged offense of providing  
9 material support for an act of terrorism.

10           In order to find the accused guilty of this offense, you  
11 must be convinced beyond a reasonable doubt of each of the following  
12 elements:

13           First, on or about November 24, 2001, the accused did a  
14 certain overt act, that is, he transported two SA-7 missiles;

15           Second, that the act was done with the specific intent to  
16 commit the offense of providing material support for an act of  
17 terrorism;

18           Third, that the act amounted to more than mere preparation;  
19 that is, it was a substantial step and a direct movement toward the  
20 provision of material support for an act of terrorism;

21           Fourth, that the act apparently tended to effectuate the  
22 commission of the intended offense of providing material support for  
23 terrorism, that is the act apparently would have resulted in the

1 actual commission of the offense of providing material support for  
2 terrorism except for an unexpected intervening circumstance, the  
3 accused's capture, which prevented the completion of that offense;

4 Fifth, that the conduct took place in the context of and  
5 was associated with an armed conflict.

6 Preparation consists of devising or arranging the means or  
7 measures necessary for the commission of the attempted offense. To  
8 find the accused guilty of this offense, you must find beyond a  
9 reasonable doubt that the accused went beyond preparatory steps, and  
10 his act amounted to a substantial step and a direct movement towards  
11 the commission of the intended offense.

12 A substantial step is one that is strongly corroborative of  
13 the accused's criminal intent and is indicative of his resolve to  
14 commit the offense. Proof that the offense of material support for  
15 terrorism actually occurred or was completed by the accused is not  
16 required; however, it must be proved beyond a reasonable doubt that  
17 at the time of the acts, the accused intended every element of the  
18 offense of providing material support for a terrorist act. The  
19 elements of the attempted offense providing material support for a  
20 terrorist act and definitions have been described on page 7 of these  
21 instructions under Specification 1 of Charge II. They also apply  
22 here.

1           In Specification 4 of Charge II the accused is charged with  
2 an attempt to provide material support for an international terrorist  
3 organization. In order to find the accused guilty of this offense  
4 you must be convinced beyond a reasonable doubt of each of the  
5 following elements:

6           First, that on or about November 24, 2001, the accused did  
7 a certain overt act; that is, he transported two SA-7 missiles;

8           Second, that the act was done with the specific intent to  
9 commit the offense of providing material support for an international  
10 terrorist organization engaged in hostilities against the United  
11 States;

12           Third, that the act amounted to more than mere preparation;  
13 that is, it was a substantial step and a direct movement toward the  
14 provision of material support for an international terrorist  
15 organization;

16           Fourth, that the act apparently tended to effectuate the  
17 commission of the intended offense of providing material support for  
18 terrorism; that is, the act apparently would have resulted in the  
19 actual commission of the offense of providing material support for an  
20 international terrorist organization except for an unexpected  
21 intervening circumstance, his capture, which prevented the completion  
22 of that offense;

1 Fifth, that the conduct took place in the context of and  
2 was associated with an armed conflict.

3 The definition of preparation and the other supporting  
4 instructions and definitions relevant to Specification 4 appear also  
5 under Specification 3 and they apply to this offense.

6 In Specification 5 of Charge II, the accused is charged  
7 with providing material support for an act of terrorism. In order to  
8 find the accused guilty of this offense, you must be convinced beyond  
9 a reasonable doubt of each of the following elements:

10 First, between about February 1996 and November 24, 2001,  
11 the accused provided material support or resources, to wit, his  
12 services as a driver for Usama bin Laden, to be used in preparation  
13 for or in carrying out an act of terrorism;

14 Second, that he knew or intended that the material support  
15 or resources were to be used for carrying out an act of terrorism;

16 And third, that the conduct took place in the context of  
17 and was associated with an armed conflict.

18 In Specification 6 of Charge II, the accused is charged  
19 with providing material support for an international terrorist  
20 organization. In order to find the accused guilty of this offense,  
21 you must be convinced beyond a reasonable doubt of each of the  
22 following elements:

1           First, between about February 1996 and November 24, 2001,  
2 the accused provided material support or resources, to wit, his  
3 services as a driver for Usama bin Laden to be used in support of al  
4 Qaeda, an international terrorist organization engaged in hostilities  
5 against the United States;

6           Second, that he intended to provide such material support  
7 or resources to an international organization;

8           Third, that he knew that such organization, al Qaeda, has  
9 engaged in or engages in terrorism;

10          And fourth, that the conduct took place in the context of  
11 and was associated with an armed conflict.

12          In Specification 7 of Charge II, the accused is charged  
13 with providing material support for an act of terrorism. In order to  
14 find the accused guilty of this offense, you must be convinced beyond  
15 a reasonable doubt of each of the following elements:

16          First, between about February 1996 and November 24, 2001,  
17 the accused provided material support or resources to wit, his  
18 services as a bodyguard for Usama bin Laden to be used in preparation  
19 for or in carrying out an act of terrorism;

20          Second, that he knew or intended that the material support  
21 or resources were to be used for carrying out an act of terrorism;  
22 and third, that the conduct took place in the context of and was  
23 associated with an armed conflict.

1           In Specification 8 of Charge II, the accused is charged  
2 with providing material support for an international terrorist  
3 organization. In order to find the accused guilty of this offense,  
4 you must be convinced beyond a reasonable doubt of each of the  
5 following elements:

6           First, between about February 1996 and November 24, 2001,  
7 the accused provided material support or resources, to wit, his  
8 services as a bodyguard for Mr. bin Laden to be used in support of al  
9 Qaeda, an international terrorist organization engaged in hostilities  
10 against the United States;

11           Second, that he intended to provide such material support  
12 or resources to an international terrorist organization;

13           Third, that he knew such organization has engaged in or  
14 engages in terrorism; and fourth that the conduct took place in the  
15 context of and was associated with an armed conflict.

16           With respect to Specifications 1, 3, 5, and 7 of Charge II,  
17 "terrorism" is defined as the intentional killing or the intentional  
18 infliction of great bodily harm on one or more protected persons, or  
19 intentionally engaging in acts that evince a wanton disregard for  
20 human life in a manner calculated to influence or affect the conduct  
21 of government or a civilian population by intimidation or coercion,  
22 or to retaliate against government conduct.

1           With respect to each of the eight specifications under  
2 Charge II, "material support or resources" means any property,  
3 tangible or intangible, or service, including currency or monetary  
4 instruments or financial securities, financial services, lodging,  
5 training, expert advice or assistance, safe houses, false  
6 documentation or identification, communications equipment,  
7 facilities, weapons, lethal substances, explosives, personnel--  
8 meaning one or more individuals who may be or include oneself--and  
9 transportation, except for medicine or religious materials.

10           In order to be an act of terrorism, the act must be  
11 wrongful, which means that it was undertaken without legal  
12 justification or excuse. An act--an attack on a military objective  
13 undertaken by military forces of a state in the exercise of their  
14 official duties would not constitute an act of terrorism.

15           To convict the accused of providing material support for an  
16 act of terrorism, the government must prove beyond a reasonable doubt  
17 that the accused knew or intended to provide support for either the  
18 preparation for or the execution of a specific act of terrorism. The  
19 offense is inherently forward-looking and the accused cannot be  
20 convicted for providing material support for past acts of terrorism.

21           To convict the accused of providing material support for an  
22 international terrorist organization, the government must prove  
23 beyond a reasonable doubt that in providing material support or



1 resources, the accused did so knowing that the material support or  
2 resources could or would be utilized to further the activities of the  
3 international terrorist organization and not merely the personal  
4 interests of al Qaeda's individual members.

5           With respect to each of the ten specifications before you,  
6 the government must prove beyond a reasonable doubt that the actions  
7 of the accused took place in the context of and that they were  
8 associated with armed conflict. In determining whether an armed  
9 conflict existed between the United States and al Qaeda and when it  
10 began, you should consider the length, duration, and intensity of  
11 hostilities between the parties, whether there was protracted armed  
12 violence between governmental authorities and organized armed groups,  
13 whether and when the United States decided to employ the combat  
14 capabilities of its armed forces to meet the al Qaeda threat, the  
15 number of persons killed or wounded on each side, the amount of  
16 property damage on each side, statements of the leaders of both sides  
17 indicating their perceptions regarding the existence of an armed  
18 conflict, including the presence or absence of a declaration to that  
19 effect, and any other facts or circumstances you consider relevant to  
20 determining the existence of armed conflict.

21           The parties may argue the existence of other facts and  
22 circumstances from which you might reach your determination regarding  
23 this issue. In determining whether the acts of the accused took

1 place in the context of and were associated with an armed conflict,  
2 you should consider whether the acts of the accused occurred during  
3 the period of an armed conflict as defined above, whether they were  
4 performed while the accused acted on behalf of or under the authority  
5 of a party to the armed conflict, and whether they constituted or  
6 were closely and substantially related to hostilities occurring  
7 during the armed conflict and other facts and circumstances you  
8 consider relevant to this issue.

9           Counsel may address this matter during their closing  
10 arguments, and may suggest other factors for your consideration.  
11 Conduct of the accused that occurs at a distance from the area of  
12 conflict can still be in the context of and associated with armed  
13 conflict, as long as it was closely and substantially related to the  
14 hostilities that comprised the conflict.

15           A number of pretrial statements by the accused have been  
16 admitted into evidence through the testimony of various federal  
17 agents. The defense has introduced evidence that the accused's  
18 statements were obtained without any warning or advisement of a right  
19 to remain silent, and that this was the result of a formal policy  
20 decision not to give any such warnings. I have determined that these  
21 statements were admissible in a trial by military commission without  
22 such warnings. You must decide the weight or significance, if any,  
23 such statements deserve under all the circumstances.

1           In deciding what weight or significance, if any, to give to  
2 the accused's statements, you should consider the specific evidence  
3 offered on the matter, your own common sense and knowledge of human  
4 nature, and the nature of any corroborating evidence, as well as the  
5 other evidence introduced in this trial.

6           Evidence may be direct or circumstantial. Direct evidence  
7 is evidence which tends directly to prove or disprove a fact in  
8 issue. If a fact in issue was whether it rained during the night,  
9 for example, testimony by a witness that he saw it rain would be  
10 direct evidence that it had rained. On the other hand,  
11 circumstantial evidence is evidence which tends to prove some other  
12 facts from which, either alone or together with some other facts or  
13 circumstances, you may reasonably infer the existence or nonexistence  
14 of a fact in issue. If there was evidence that the street was wet in  
15 the morning, for example, that would be circumstantial evidence from  
16 which you might reasonably infer that it rained during the night.

17           There is no general rule for determining or comparing the  
18 weight to be given to direct or circumstantial evidence. You should  
19 give all the evidence the weight and value you believe it deserves.

20           I have instructed you that with respect to Specifications  
21 2, 4, 6 and 8 under Charge II, the government must prove beyond a  
22 reasonable doubt that the accused actually intended that his support  
23 be used for an international terrorist organization. Direct evidence

1 of intent is often unavailable. The accused's intent, however, may  
2 be proved by circumstantial evidence, that is, by facts or  
3 circumstances from which you may reasonably infer the existence of  
4 such an intent.

5 In deciding this issue, you must consider all the relevant  
6 facts and circumstances, including but not limited to evidence that  
7 he did or did not know a particular matter at a particular time, that  
8 he was or was not told of plans then being prepared, his awareness or  
9 lack of it regarding what Mr. bin Laden and al Qaeda were doing, and  
10 the degree of his involvement in or agreement with those plans.

11 I have instructed you that with respect to Specifications  
12 1, 3, 5, and 7 under Charge II, you must be satisfied beyond a  
13 reasonable doubt that the accused knew that the support he was  
14 providing would be used for an act of terrorism. As with intent,  
15 direct evidence of a person's knowledge is often unavailable. This  
16 knowledge, like any other fact, may be proved by circumstantial  
17 evidence. In deciding this issue, you must consider all relevant  
18 facts and circumstances such as those you may consider with respect  
19 to the issue of the accused's intent.

20 I have taken judicial notice that at all times relevant to  
21 this case, the Taliban were the de facto government of Afghanistan  
22 and that Taliban military personnel were serving as the regular armed  
23 forces of the State of Afghanistan. I have also taken judicial

1 notice that at all relevant times Afghanistan was a signatory to all  
2 four of the Geneva Conventions of 1949. This means that you are now  
3 permitted to recognize and consider those facts without further  
4 proof. It should be considered by you as evidence with all the other  
5 evidence in the case. You may, but are not required to, accept as  
6 conclusive any matter I have judicially noticed.

7           You have the duty to determine the believability of the  
8 witnesses. In performing this duty, you must consider each witness'  
9 intelligence, ability to observe and accurately remember, sincerity  
10 and conduct in court, and prejudices and character for truthfulness.

11           Consider also the extent to which each witness is either  
12 supported or contradicted by other witnesses or evidence, the  
13 relationship each witness may have with either side, and how each  
14 witness might be affected by the verdict. In weighing discrepancies  
15 by a witness or between witnesses, you should consider whether they  
16 resulted from an innocent mistake, a failure of memory, or a  
17 deliberate lie.

18           Taking all these matters into account, you should then  
19 consider the probability of each witness' testimony and the  
20 inclination of the witness to tell the truth. The believability of  
21 each witness' testimony should be your guide in evaluating testimony  
22 and not the number of witnesses called.

1           An accused may be convicted based only on evidence before  
2 the Court, and not on evidence of a general criminal disposition.  
3 Each offense must stand on its own, and you must keep the evidence  
4 respecting each offense separate. Stated differently, if you find or  
5 believe that the accused is guilty of one offense, you may not use  
6 that finding or belief as a basis for inferring, assuming, or proving  
7 that he committed any other offense. If evidence had been presented  
8 which is relevant to more than one offense, you may consider that  
9 evidence with respect to each offense to which it is relevant. For  
10 example, evidence has been presented with respect to Mr. Hamdan's  
11 possession of missiles. You may consider that evidence with respect  
12 to each of the offenses that relate to the possession of missiles.

13           The burden is on the prosecution to prove each and every  
14 element of each offense beyond a reasonable doubt. Proof of one  
15 offense carries with it no inference that the accused is guilty of  
16 any other offense. If you have doubt about the time, place or manner  
17 in which any of the offenses described in the specifications were  
18 committed, but you are satisfied beyond a reasonable doubt that the  
19 offense was committed at a slightly different time or place or in a  
20 particular manner which differs slightly from the exact time, place,  
21 or manner in the specification, you may make minor modifications in  
22 reaching your findings by changing the time, place or manner in which  
23 --in which the acts described in the specification were committed,

1 provided that you do not change the nature or identity of the  
2 offense.

3           As to any specification, if you have doubt that the  
4 government has proven all of the times, places and manners charged in  
5 the specification, you may still reach a finding of guilty so long as  
6 all the elements of the offense are proved beyond a reasonable doubt,  
7 but you must modify the specification to correctly reflect your  
8 findings. For example, in a different context, if a young sailor  
9 were accused of stealing a radio and a bike and you found that he  
10 stole the bike but not the radio, you would find him guilty excepting  
11 the words "the radio." If a young soldier was convicted of an  
12 unauthorized absence from the 1st of July to the 10th of July and you  
13 found that he returned on the 8th of July, you would find him guilty,  
14 except the words "10 July," and substituting the words "8 July."

15           Understand how those might work? **[Affirmative response**  
16 **from the members.]**

17           MJ [CAPT ALLRED]: I remind you that you may not infer that the  
18 accused is guilty of any offense from the fact that some evidence was  
19 presented in closed trial sessions. You also may not reach any other  
20 inference adverse to the accused from the fact that a session of the  
21 trial was closed to the public. You must evaluate open and closed  
22 session evidence and witnesses using the same standards.

1           Closed trial sessions to consider classified evidence are  
2 the most satisfactory method for resolving the competing needs of the  
3 government for the protection of purportedly classified information  
4 and the rights of the accused to a public trial. You may not hold  
5 the fact that there have been closed trial sessions in any way  
6 against the accused. Closed trial sessions do not erode the  
7 presumption of innocence which the law guarantees to the accused.  
8 You have heard the testimony of Evan Kohlmann, Geoffrey Corn and  
9 Brian Williams. These are known as expert witnesses because their  
10 knowledge, skill, experience, training or education may assist you in  
11 understanding the evidence or in determining a fact in issue. You  
12 are not required to accept the testimony of an expert witness or give  
13 it more weight than the testimony of an ordinary witness. You  
14 should, however, consider their qualifications as experts.

15           Only you, the members of the Court, determine the  
16 credibility of the witnesses and what the facts of this case are. No  
17 expert witness or other witness can testify that the period of armed  
18 conflict between the United States and al Qaeda began on any  
19 particular date. To the extent that you believe that Professor Corn  
20 or Mr. Kohlmann testified or implied that they believe the armed  
21 conflict began on a particular date, you may not consider this as  
22 evidence that the armed conflict did in fact began on that date.



1           During the testimony of various witnesses who appeared  
2 before you, they were asked whether they were aware of certain  
3 matters counsel believed they should or might be aware of. These  
4 were permissible questions. If the witness denied that they had  
5 knowledge of the matters inquired into, there is no evidence before  
6 you that those matters actually occurred. These questions were  
7 permitted to test the basis of the witness' opinion and to enable you  
8 to assess the weight to accord their testimony. You may not consider  
9 the question for any other purpose.

10           You have heard evidence that before trial, various  
11 witnesses made statements that may be inconsistent with their  
12 testimony here in court. If you believe that an inconsistent  
13 statement was made, you may consider the inconsistency in deciding  
14 whether to believe that witness's in-court testimony. You may not  
15 consider the earlier statements as evidence of the truth of the  
16 matters contained in the prior statement. In other words, you may  
17 only use them as one way of evaluating the witness's testimony in  
18 court. You cannot use them as proof of anything else.

19           For example, if a witness testifies in court that the  
20 traffic light was green and you heard evidence that the witness made  
21 a prior statement that the traffic light was red, you may consider  
22 that prior statement in evaluating the truth of the in-court

1 testimony. You may not, however, use the prior statement as proof  
2 that the light was actually red.

3           You are further advised: first, that the accused is  
4 presumed to be innocent until his guilt is established by legal and  
5 competent evidence beyond a reasonable doubt; second, if there is a  
6 reasonable doubt as to the guilt of the accused, that doubt must be  
7 resolved in favor of the accused and he must be acquitted; third, if  
8 there is a reasonable doubt as to the degree of guilt, that doubt  
9 must be resolved in favor of the accused, in favor of the lower  
10 degree of guilt as to which there is no reasonable doubt.

11           Finally, the burden of proof to establish the guilt of the  
12 accused beyond a reasonable doubt is on the government. The burden  
13 never shifts to the accused to establish his innocence or to disprove  
14 the facts necessary to establish each element of each offense.

15           The term "reasonable doubt" does not mean a fanciful or  
16 ingenuous doubt or a conjecture, but an honest, conscientious doubt  
17 suggested by the material evidence or lack of it in the case. It is  
18 an honest misgiving generated by insufficiency of proof of guilt.  
19 Proof beyond a reasonable doubt means proof to an evidentiary  
20 certainty, although not necessarily to an absolute or mathematical  
21 certainty. The proof must be such as to exclude not every hypothesis  
22 or possibility of innocence, but every fair and rational hypothesis  
23 except that of guilt.

1           The rule as to reasonable doubt extends to every element of  
2 each offense, although each particular fact advanced by the  
3 prosecution that is not an element need not be established beyond a  
4 reasonable doubt. However, if on the whole evidence you are  
5 satisfied beyond a reasonable doubt of the truth of each and every  
6 element, then you should find the accused guilty.

7           Bear in mind that only matters properly before the Court as  
8 a whole should be considered. In weighing and evaluating the  
9 evidence, you are expected to use your own common sense, your  
10 knowledge of human nature and your knowledge of the ways of the  
11 world. In light of all the circumstances in this case, you should  
12 consider the inherent probability or improbability of the evidence.

13           Bear in mind you may properly believe one witness and  
14 disbelieve several witnesses whose testimony conflicts with the one.  
15 The final determination as to the weight or significance of the  
16 evidence and the credibility of the witnesses in this case rests  
17 solely upon you.

18           You must disregard any comment or statement or expression  
19 made by me during the course of the trial that might seem to indicate  
20 any opinion on my part as to whether the accused is guilty or not  
21 guilty, since you alone have the responsibility to make that  
22 determination. Each of you must impartially decide whether the

1 accused is guilty or not guilty according to the law I have given  
2 you, the evidence admitted in court and your own conscience.

3 At this time, you will hear argument by counsel. As  
4 counsel for the government has the burden of proof, the trial counsel  
5 may open and close. Trial counsel's argument I am informed is  
6 expected to be about an hour. Does anyone think we should take a  
7 recess before we enter into a--I see several happy faces suggesting  
8 that's a good idea. Why don't we take about a ten-minute recess and  
9 return to hear the prosecutor's opening argument--closing argument?

10 BAILIFF: All rise **[all persons did as directed]**.

11 CTC [MR. TRIVETT]: Sir, the prosecution has one other issue to  
12 bring up outside the members----

13 MJ [CAPT ALLRED]: Okay. **[The members departed the courtroom.]**  
14 **[The military commission terminated and the R.M.C. 803 session**  
15 **commenced at 1045, 4 August 2008.]**

16 MJ [CAPT ALLRED]: All right. Please be seated **[all persons did**  
17 **as directed]**.

18 Do we have an issue to take up outside the presence of the  
19 members?

20 CTC [MR. TRIVETT]: Yes, sir. In regards to the instructions  
21 given--and I apologize, sir, I missed this. But in conspiracy to  
22 attack civilians and conspiracy to attack civilian objects, the  
23 military judge included "international armed conflict."

1 MJ [CAPT ALLRED]: I noticed that I had that in there in a  
2 couple of places and not in other places. That was----

3 CTC [MR. TRIVETT]: And I saw you corrected yourself--because  
4 you had "international armed conflict" but only read "armed conflict"  
5 in regard to murder in violation of the law of war.

6 MJ [CAPT ALLRED]: Okay. I can easily correct that. I noticed  
7 that as I was reading along with a couple of other--okay. Why don't  
8 you highlight those and I'll just correct them to the members before  
9 we start your argument?

10 CTC [MR. TRIVETT]: Yes, sir.

11 MJ [CAPT ALLRED]: Anything else that I need to correct?

12 [No response.]

13 MJ [CAPT ALLRED]: Very good. Let's take a recess.

14 **[The R.M.C. 803 session recessed at 1046, 4 August 2008.]**

15 **[The R.M.C. 803 session was called to order at 1058, 4 August 2008.]**

16 **All parties present when the commission recessed were once again**  
17 **present.]**

18 MJ [CAPT ALLRED]: I understand there might be another comment  
19 about the instructions I need to hear before we call the members back  
20 in.

21 CTC [MR. TRIVETT]: Yes, sir. In regards to murder in violation  
22 of the law of war, sir, and how it was instructed, under the  
23 definition of when a killing violates the law of war, it's correctly

1 stated, but it then neglects to state that if an unlawful combatant  
2 were to kill a lawful combatant that that would also be a violation  
3 of the law of war. That's consistent with filings that we have set  
4 forth in the past based on our instructions and as well as our belief  
5 that murder in violation of the law of war was, in fact, an offense  
6 cognizable by the law of war.

7 MJ [CAPT ALLRED]: Well, we took this up Saturday afternoon in  
8 our argument and the defense provided me an affidavit by Professor  
9 Schmidt and a citation to Dr. Dinstein's book, both of which I think  
10 hold to the contrary. So I don't think I'll give that instruction.  
11 Have I missed something?

12 CTC [MR. TRIVETT]: Well, we believe in order to---

13 MJ [CAPT ALLRED]: I mean, what they said is----

14 CTC [MR. TRIVETT]: Yes, sir.

15 MJ [CAPT ALLRED]: ----that if an unlawful combatant kills a  
16 lawful combatant, that's murder that can be punished by the domestic  
17 legal system of the detaining power, but it's not murder in violation  
18 of the law of war. It's just a murder in violation of domestic law.

19 CTC [MR. TRIVETT]: The U.S. government's position has always  
20 been that it's both, sir; that per se--that unlawful belligerency is  
21 a per se violation of the law of war. All of our prior filings in  
22 regard to the bandits and how individuals were treated in the past  
23 regarding individuals who were unlawful belligerents were that they

1 were summarily executed. That's consistent with our understanding  
2 that it was a violation of the law of war for them to have been  
3 belligerents that were unlawful to begin with. And the belligerent  
4 requires an actual act of belligerency. It's not a status.

5 MJ [CAPT ALLRED]: Okay. Well, I think it's too late for me to  
6 give that instruction for you now. I believe you're wrong. I mean,  
7 I believe that the defense's authorities are on point and on the  
8 matter, so it's too late at this point, I think, to research it and  
9 decide whether you're entitled to a different instruction. So I'll  
10 advise the members that the word "international" doesn't need to  
11 modify "armed conflict," and then we're ready to go with the closing  
12 arguments, okay?

13 CTC [MR. TRIVETT]: Yes, sir.

14 MJ [CAPT ALLRED]: Thank you.

15 CDC [MR. MURPHY]: Your Honor, the government has slides as part  
16 of its closing argument and would request that they be shown to all  
17 counsel and the members during the presentation.

18 MJ [CAPT ALLRED]: Sure. How many do you have?

19 CTC [MR. MURPHY]: They embed copies of evidence that has  
20 already been admitted in this case.

21 MJ [CAPT ALLRED]: Very well.

22 CTC [MR. MURPHY]: And would ask that they also appear on the  
23 large screen behind the witness box as well.

1 MJ [CAPT ALLRED]: That's fine. Okay. Let's call the members  
2 back into the courtroom.

3 BAILIFF: All rise **[all persons did as directed and the members**  
4 **enter the courtroom]**.

5 **[The R.M.C. 803 session terminated and the military commission**  
6 **commenced 1100, 4 August 2008.]**

7 MJ [CAPT ALLRED]: Please be seated **[all persons did as**  
8 **directed]**. Thank you. The members have returned to the courtroom.

9 Members, in spite of my best efforts, I made a couple of  
10 mistakes in the instructions. These all have to do with the element  
11 that the agreement and the intended attack took place in the context  
12 of and was associated with armed conflict. On a couple of occasions  
13 I said "international armed conflict." That's not required. It's  
14 only required that armed conflict exists. So I've gone through my  
15 copy of the instructions, scratched out the word "international" and  
16 if you find it elsewhere please disregard it as an incorrect  
17 statement of the element.

18 Are there any other objections to the instructions as I  
19 gave them that have not already been placed on the record? Guess  
20 not from the government----

21 CTC [MR. TRIVETT]: No, sir.

22 MJ [CAPT ALLRED]: Thank you.

23 DC [LCDR MIZER]: None from the defense, Your Honor.



1 MJ [CAPT ALLRED]: Okay. I guess we're in the hands of Mr.  
2 Murphy, then, for the government's closing argument.

3 CTC [MR. MURPHY]: Thank you, Your Honor, and I would request  
4 that the screens, including the screens in front of the members, be  
5 activated for some slides that I will have during the closing  
6 argument.

7 MJ [CAPT ALLRED]: Okay.

8 CTC [MR. MURPHY]: Mr. President and members of this military  
9 commission: I want to begin first by thanking you for your time,  
10 your attention, your patience during what has amounted to about two  
11 weeks of trial.

12 Now we turn to the argument in this case, in which I will  
13 sum up the key facts that the government will assert should lead to  
14 the conviction of this accused on each and every charge. You heard  
15 my name briefly at the beginning of this case more than two weeks  
16 ago. I'm John Murphy. I am an attorney with the Department of  
17 Justice. I am a Navy Captain in the Naval Reserve and a Judge  
18 Advocate.

19 Let's turn to my argument. In Charge I, Specification 1,  
20 the accused is charged with entering an agreement with one or more of  
21 the following persons--and there are five persons named in the charge  
22 sheet, and you see pictures of the first two there: Usama bin Laden,

1 the senior al Qaeda leader, the emir of al Qaeda, the head of the  
2 Shura Council and the world's most dangerous terrorist.

3 To his right, Ayman al Zawahiri, Shura Council member, head  
4 of the al Qaeda media committee. The other three: Saif al Adel,  
5 Shura Council member, head of the security committee, head of the  
6 bodyguard detachment, and Salim Hamdan's immediate boss in his body  
7 guarding activities; Said al Masri, Shura Council member, head of the  
8 finance committee; and Muhammad Atef, Shura Council member and head  
9 of the military committee; as well as other members or associates  
10 were charged who are known and unknown of the al Qaeda organization.

11 How did this conspiracy begin? Well, you have learned that  
12 the accused met an individual by the name of Muhammad bin Attash who  
13 tried to help the accused go to fight jihad in Tajikistan, and when  
14 the accused failed to get into Tajikistan, this same Muhammad bin  
15 Attash helped the accused meet Usama bin Laden, and that was in or  
16 about February, 1996. And it's important to remember the testimony  
17 that even before the accused ever met bin Laden the accused was aware  
18 of his goals and his aims of terrorism.

19 The accused met Usama bin Laden in Kandahar in 1996 and  
20 agreed to join UBL and his followers, first as a driver on the farms  
21 and a mechanic--that's the al Qaeda farms and an al Qaeda mechanic.  
22 And at the time of their first meeting, Usama bin Laden noted that  
23 the accused was from the Hadramout region. You may recall that's a

1 region that Usama bin Laden comes from himself, and immediately they  
2 formed a special trust based on the tribal relationships in that  
3 region.

4           As I mentioned, the accused was initially assigned to the  
5 al Qaeda farms and he remained under the watchful eye of bin Laden  
6 and Saif al Adel. And it wasn't but eight months later that this  
7 accused was promoted within the al Qaeda organization, becoming a  
8 full bin Laden bodyguard and a full member of the protective detail  
9 of bin Laden where he remained until his capture. He pledged bayat  
10 to Usama bin Laden, fully subscribing to the notion that he would  
11 fight the crusaders, another term for American and coalition members,  
12 that he would fight the Jews, that he would fight the West. The only  
13 carve-out exception that he made was to fighting Muslim on Muslim,  
14 but he was fully on board to fight everyone else.

15           What did he do in his protective duties as part of this  
16 charged conspiracy? He provided protective convoy detail service.  
17 Driving Hilux pick up trucks, he and the other bodyguards, using two-  
18 way radios, Kalashnikov rifles, PK machine guns, RPGs were located in  
19 the rear trail vehicle of his convoy. The accused himself carried a  
20 Makarov handgun and was responsible for changing out convoy vehicles  
21 periodically, and he obtained replacement vehicles at al Qaeda  
22 guesthouses. He specifically understood that his duties as a driver  
23 and bodyguard for al Qaeda, for Usama bin Laden, included driving

1 Usama bin Laden away to safety in the event the convoy came under  
2 attack and that other bodyguards would engage the attackers.

3 Now, I ask you for a moment to imagine that situation,  
4 which unfortunately never happened; but had it happened, that convoy  
5 would be driving along somewhere under attack, and one vehicle would  
6 break away from the convoy. Pursuant to Hamdan's duty, he would  
7 break away. And who would be in that vehicle driving al Qaeda to  
8 safety? It would be this accused, Salim Hamdan, and Usama bin Laden.  
9 This accused was al Qaeda's last line of defense should the convoy  
10 come under attack.

11 This accused understood that Saif al Adel was in charge of  
12 security, in fact, was chief of the bodyguards. And Hamdan did other  
13 things in support of this charged conspiracy. He picked up weapons,  
14 ammunition, and supplies from Taliban warehouses. In fact, Saif al  
15 Adel gave him documents so that the accused could get weapons and  
16 ammunition from Taliban warehouses and deliver them, where? Not to  
17 the Taliban. To al Qaeda. And we are talking about weapons other  
18 than the SA-7 missiles that we talked about a little while ago. You  
19 have evidence that he transported other weapons, ammunition. And the  
20 accused transported this material on Usama bin Laden's trucks, and he  
21 transported them to Kandahar al Qaeda bases. And if you'll recall  
22 the admissions in this regard, it was the accused's own decision to  
23 transport these weapons and to bring them to the front.

1           What else has he done to show he is a full-fledged member  
2 of this conspiracy? He trained. He trained at the al Farouq camp  
3 that you heard about. He trained in various firearms. In fact, he  
4 sought out bin Laden's permission for weapons training. He provided  
5 armed bodyguard services to UBL and the al Qaeda leadership, and he  
6 provided this when bin Laden gave speeches, press conferences. In  
7 fact, you heard about two of those press conferences, both occurring  
8 in the year 1998. He took bin Laden and other al Qaeda members to  
9 training camps, listening to the lectures, going to the media events.

10           This accused, as a coconspirator, heard the anti-American,  
11 the anti-West, the anti-Jewish right rantings. And he knew even more  
12 as a coconspirator. He was fully aware of the 1996 declaration of  
13 war, a fatwa issued by Usama bin Laden. He was fully aware of the  
14 declaration on America in 1998 by bin Laden and others. He was aware  
15 of what both documents represented, and he remained within the  
16 conspiracy knowing full well what the intent of al Qaeda was.

17           He was with bin Laden and Zawahiri at the all-important merger  
18 of the Egyptian Islamic Jihad and al Qaeda, which occurred in 1998 at  
19 Tarnak Farms, when the deadly al Qaeda organization was strengthened  
20 through the merger of these two organizations. He saw it, he was  
21 there, he participated, he provided services. He was on board as a  
22 coconspirator. He saw videos after attacks, knowing exactly what  
23 happened as result of his contribution to this conspiracy. He saw

1 videos of the attack on East Africa and videos of the attack on the  
2 USS COLE.

3 Did he abandon the conspiracy? Did he withdraw it? Did he  
4 say he wanted no part of it? Absolutely not, because he was a full  
5 member. He was in with his full weight of participation.

6 And it's interesting. The accused's involvement with al  
7 Qaeda runs even deeper than the vital services he provided to this  
8 terror group. Even his personal life was merged with al Qaeda.  
9 Usama bin Laden arranged a marriage for him. Specifically, the  
10 accused married the sister of Jandal's wife, Jandal being another  
11 bodyguard. And that played an important role in al Qaeda. It helped  
12 cement loyalties. It helped keep him under control. It kept him  
13 within the family. It kept him very much close to all the other  
14 people in al Qaeda, including other bodyguards. And so significant  
15 was this marriage within the al Qaeda family, if you will, that the  
16 leader of al Qaeda himself, Usama bin Laden, hosted a wedding feast  
17 for the accused, showing you just how close he was to the very top of  
18 this terror pyramid.

19 In further support of this charge of conspiracy, you will  
20 recall the testimony of Special Agent [REDACTED], NCIS Special Agent  
21 [REDACTED], and also FBI Special Agent [REDACTED], where they  
22 testified that they showed the accused photos of bodyguards and other  
23 members of al Qaeda. You saw that during the presentation. And this

1 accused identified many of those photos. He knew all of the key  
2 players surrounding and protecting al Qaeda. You also saw the many  
3 photos that former FBI Agent [REDACTED] presented to the accused  
4 showing many, many top leaders within the al Qaeda organization.  
5 This accused identified them and had something to say about them. He  
6 knew the organization. He knew it because he was a member. He knew  
7 it because he was conspirator, as charged in Count 1.

8 He also knew other important facts, which shows you just  
9 how ingrained he was into the organization. There was testimony that  
10 he knew that Usama bin Laden personally approved terror operations.  
11 He was present at lectures when Usama bin Laden talked about the need  
12 for suicide bombers, for the war on America, for the duty of Muslims  
13 to fight America, for the need for martyrs, for the need to remove  
14 U.S. troops from Saudi Arabia and Afghanistan. He understood the  
15 role of the al Qaeda farms under the finance committee, because he  
16 started there. He went to the training camps to be a trained al  
17 Qaeda warrior. He went to the guesthouses. He went to the media  
18 propaganda. He went to every part of the organization, understood  
19 it, remained, and helped.

20 He understood on the East Africa American embassy attacks  
21 that UBL was going face to face, toe to toe with America, and that he  
22 was uncertain of our response. He heard about Usama bin Laden's

1 reaction to 9/11, and the fact that far more victims were killed than  
2 UBL ever thought possible. He knew all of that.

3 Charge I, Specification 1 continues: Conspiracy. To  
4 commit one of more of the following offenses, Judge Allred has given  
5 you the definitions of these terms. I won't belabor them by  
6 repeating them here, but I will highlight them and say that the  
7 evidence of attacking civilians is found in the East Africa and 9/11  
8 attack. Attacking civilian objects, again, in East Africa and 9/11.  
9 Murder in violation of the law of war, East Africa, the COLE, and  
10 9/11. Destruction of property in violation of the law of war, East  
11 Africa, COLE, and 9/11. And, terrorism, East Africa, USS COLE, and  
12 9/11. Let's start by talking about what we know about each of those  
13 attacks. Let's start with East Africa.

14 The accused was present at an al Qaeda press conference in  
15 Khost prior to the East Africa operation. Just prior to the East  
16 Africa attack in Kenya and in Tanzania, the accused knew something.  
17 And this is a critical fact, a very critical fact. The accused knew  
18 that an operation was about to proceed, and he knew that an operation  
19 meant a terrorist attack. And you learned that specifically from two  
20 key witnesses in this case, former FBI Special Agent [REDACTED] and  
21 current FBI Supervisory Special Agent [REDACTED].

22 What else did you learn? In addition to the fact that he  
23 knew that terror was going to occur before it happened, you learned



1 that the accused participated in the evacuation of the Kandahar  
2 compound before the attack. You learned that Saif al Adel told the  
3 accused to fix cars and be ready to move soon. You learned that the  
4 convoys of cars was assembled, with the help of this accused. You  
5 learned that within that convoy was UBL, Uthman--that's UBL's son--  
6 Abu Hamas. They were in the convoy. You learned that the movement  
7 was going to be low key. The accused understood that this was the  
8 first time UBL was going face to face with the United States, and the  
9 group was uncertain as to what the U.S. response would be. The group  
10 traveled to Kabul. Then, they returned to Kandahar. The accused  
11 assisted in the preparation of and the moving of key leaders to  
12 affect this attack.

13           The accused later saw a video of the East Africa attack,  
14 and he heard bin Laden and Abu Muhammad al Masri talk about the  
15 attack. Did he withdraw from the conspiracy? Did he say, "I want  
16 none of it"? Well, he certainly knew it was about to happen, and he  
17 never withdrew.

18           Let's turn to the COLE. The accused was in Yemen when the COLE  
19 was attacked. And, at first, you recall from the testimony, he  
20 thought the attack was done by others. But then he learned that it  
21 was an al Qaeda attack. And what was his first thought when he  
22 learned it was an al Qaeda attack? He said, "I've got to get out of  
23 Yemen. I've got leave this country. They might arrest me."

1 Absolutely they might arrest him, he's a member of al Qaeda, and it  
2 is logical for him to think that authorities would pick him up. And  
3 where did he go? He went back to his leader, Usama bin Laden.

4 Now, let's talk about 9/11, another act of war. And let me  
5 highlight that each of these are acts of war, the East Africa attack,  
6 an act of war; the COLE, an act of war; 9/11, an act of war. There's  
7 an intricate pattern in which this accused helped in the preparation  
8 of and the transportation of the leadership that made this possible.  
9 They were on the move days before and after the attack. About seven  
10 to ten days before the attack, the accused and al Qaeda leaders are  
11 in Kandahar. Once again, just like East Africa, the accused knew  
12 that an operation was about to happen. And, as you know from the  
13 testimony of [REDACTED] and [REDACTED], this accused fully  
14 understood that an operation meant nothing other than a terrorist  
15 attack.

16 Once again, UBL orders the evacuation of the Kandahar camp.  
17 The accused responds. And you'll recall the map that's displayed on  
18 the screen on the slide in miniature form of the many locations--  
19 you'll see the enlarged original when you go back to your  
20 deliberation--where the accused went with the al Qaeda leadership and  
21 UBL. They went to Kabul and went to Muhammad Salah's house shortly  
22 before the attack. They then went to a Kabul guesthouse shortly  
23 after the attack and stayed at Emir Saadi Anas' house. They went to

1 Logar military camps where there were al Qaeda towns. They went to  
2 Usama bin Laden's house in Jalalabad, a place called the Star of  
3 Jihad camp. For two or three days they went to Kabul, and then for  
4 two or three days more they went to Khost, then back to Kabul, then  
5 back to Kandahar, then back to Kabul.

6 All of these movements, shown in this detailed map, all  
7 designed to assist the leaders in the execution of this attack. Take  
8 a look at that map when you go back into deliberations. It tracks  
9 through his valuable contribution to this conspiracy. And he does it  
10 all knowing that an operation is about to unfold, an operation that  
11 meant a terrorist attack.

12 Going on to Specification 1. The accused knew the unlawful  
13 purpose of the agreement. As Agent [REDACTED] stated, he questioned  
14 the accused about his attitude towards these attacks and his  
15 attitudes generally towards assisting Usama bin Laden. The East  
16 Africa attacks, the COLE attacks, and the 9/11 attacks. And what did  
17 the accused say was his attitude towards these attacks and his role  
18 in assisting Usama bin Laden? It was one of uncontrolled passion or  
19 uncontrolled enthusiasm or uncontrolled zeal "among us," among the  
20 group assembled. However you want to translate it. But that's how  
21 he felt, and that was his attitudes towards working with UBL.

22 When you evaluate this element on whether the accused knew  
23 the unlawful purpose of the agreement, you should consider all of the

1 following: He secreted UBL and al Qaeda leadership. He hid them  
2 from place to place. He armed himself. Others were working with him  
3 who were also armed. He moved in convoys in low-key movements.

4 When he was finally captured--and this speaks to the  
5 unlawful purpose--he avoided nearly every vital piece of information  
6 about his activities. You saw that on the very rare glimpse you get  
7 to see of someone who is captured on the battlefield. He resisted  
8 providing information, on the capture video.

9 He also shows his unlawful purpose in other ways. You'll  
10 recall these, the brevity cards. They are used to conceal the  
11 activity of al Qaeda, and he had these at the time of his capture.

12 Other things that show that he knew the unlawful purpose is  
13 he learned of the terrible loss of innocent life in the East Africa,  
14 COLE, and the 9/11 attacks. He knew of the tragic death of  
15 thousands. He knew all of it. He saw it clearly as unlawful, and  
16 yet he remained in the conspiracy. He was an al Qaeda warrior; and  
17 criminal enterprises do not function or carry out their objectives of  
18 their conspiracies without people like Salim Hamdan.

19 The accused knowingly committed at least one of the  
20 following overt acts in order to accomplish some object or purpose of  
21 the agreement. You see on that screen miniature versions of two  
22 stills, the one on the left being the 1998 CNN video as we've termed

1 that video showing his bodyguard work, and on the right the January  
2 2000 al-Fitr video showing him with a radio.

3           On the picture on the left, that really captures the  
4 essence of the fact that he rose through the ranks from a simple farm  
5 driver and mechanic, eight months later promoted, gaining the  
6 confidence of UBL and Saif al Adel. You see it in that picture.  
7 He's trusted with weapons. He's trusted with radios. He's trusted  
8 to transport the most senior al Qaeda leadership and keep their  
9 secrets. He's trusted to get replacement vehicles. He's trusted  
10 with Usama bin Laden's life.

11           And as I intersperse Usama bin Laden's name and al Qaeda,  
12 the organization, there should be no mistake; they are one and the  
13 same. UBL is al Qaeda. By protecting UBL, he's protecting the  
14 organization, the organization's head, inspiration, and leadership.  
15 He is a key implementing officer necessary for any criminal  
16 enterprise, necessary for any conspiracy.

17           In the picture on the right with a radio, that's  
18 significant to his driving activities. Although we didn't have a  
19 picture of him driving a vehicle, you've learned during the testimony  
20 that radios were integral to the moving of the convoys, and here you  
21 see a picture of him with a radio in his hands. These two pictures  
22 show, as far as overt acts, that he was fully aware of the goals and  
23 objectives of al Qaeda and willingly played a vital role. And if UBL

1 was killed, if Hamdan was not successful in his conspiratorial  
2 duties, the back of this terror organization most certainly would  
3 have been broken.

4 This accused ensured the very survival of al Qaeda through  
5 his participation in this conspiracy, and he was indeed the last line  
6 of defense for al Qaeda leadership. He made al Qaeda's goals  
7 achievable and, in the end, tragically, inevitable. He played a  
8 central and important role in this conspiracy.

9 Let's talk about some other points under the conspiracy in  
10 Specification 1, Charge I. He is charged with transporting and  
11 delivering weapons, ammunition, and other supplies to members or  
12 associates of al Qaeda. And one of the most important pieces of  
13 evidence and that you'll see referenced in the slide, that's the pika  
14 note, as we have come to call it. And the pika note was introduced  
15 by Witness Number One and was translated to you right on the stand by  
16 former FBI Agent [REDACTED], in which [REDACTED] told you the letter  
17 said, "Brother Saqr," the kunya, or nickname for Salim Hamdan, Saqr  
18 al Jadawi. "Brother Saqr, my request, if you can, to send us pika  
19 belts original Russian, about 25 to 30, 25 to 30 belts. Also if you  
20 find pika magazines, because the best pika we have here has no  
21 magazine and we are in necessity to it. Or even if you can, get a  
22 magazine for Kirov, and here we can cut it, and fix it, and make it  
23 for the pika at the garage. Please work as much as you can to do

1 this. Your brother, Khallad Jalalabad. If you can please find us a  
2 military compass, three, number three"--that means quantity three--  
3 "because they told us that you guys have it in Kabul, it's widely  
4 available in Kabul."

5 He's a weapons transporter, and this is independent  
6 evidence of it and it's part of the charged conspiracy.

7 As to the second bullet, driving Usama bin Laden to various  
8 al Qaeda press conferences, you learned that he drove him to such  
9 places as Tarnak Farms and the Al Farouq camp. You see Tarnak Farms  
10 depicted on the photo there taken during the tour of Special Agent  
11 [REDACTED], also UBL's house also taken during the tour or mission with  
12 Agent [REDACTED] at an actual press conference. And, as I have  
13 mentioned, he participated in the important al Qaeda conference of  
14 the merger of EIJ and al Qaeda. Of course, you learned in the  
15 testimony that he transported UBL to two separate 1998 press  
16 conferences, and you also learned that he heard many, many lectures  
17 to many different audiences about UBL's goals; and you heard, he went  
18 to so many of them, he became bored.

19 And finally on this point, you may want to recall the  
20 testimony of the FBI official who came here, [REDACTED], who  
21 described the extraordinary security precautions that typically take  
22 place at UBL news conferences or press conferences or media events,  
23 and all of the details about the camera and pat-downs and the secure

1 locations. These are the things that this accused did routinely as  
2 part of this conspiracy.

3 He received weapons training at the al Farouq training  
4 camp. In fact, he asked UBL for permission to train in firearms. He  
5 took UBL to these camps where he took this training. He admitted to  
6 weapons training in such weapons as AK-47 machine guns and other  
7 weapons. He talked about the fact that there were no formal firing  
8 ranges at the camps, and that he received instruction on RPGs and  
9 participated in physical training. Perhaps the most detailed  
10 testimony you received in this particular area on his training came  
11 from Special Agent [REDACTED], who provided great detail about  
12 his participation in training camps.

13 Let's talk about the issue of agreement under Charge I,  
14 Specification 1. You can look at the agreement in support of our  
15 report in several areas: His behavior; his own words; the fact that  
16 he understood the operation meant terrorism; the fact that there was  
17 a meeting of the minds between himself, Usama bin Laden, and other al  
18 Qaeda members; and, that there was no formality to the agreement.  
19 But you certainly may infer that the agreement existed based on all  
20 of the circumstances, the most important of which probably being that  
21 he knew, before East Africa and before 9/11, he knew an operation was  
22 about to unfold. He participated. He understood that was terrorism.  
23 He proved his agreement or understanding under the agreement by his



1 actions. And, most significantly, he never stopped performing under  
2 this agreement, ever, until he was captured. And the agreement  
3 lasted all the way from the time he met UBL, in early 1996, until he  
4 was finally captured in November 2001.

5 Let's now talk about Specification 2 of Charge I. And  
6 here, you should focus on the testimony of Major [REDACTED] and Sergeant  
7 Major A. What did you learn as a result of their testimony? You  
8 learned that the U.S. forces were deployed in the Takteh-Pol region  
9 of Afghanistan near Highway Number 4. There are about 16 U.S.  
10 forces, about 600 to 700 Afghan fighters.

11 You learned through their testimony that three vehicles  
12 were stopped at the checkpoint, gunfire was heard. Major [REDACTED] went  
13 to the vicinity of the checkpoint. He learned that a second vehicle  
14 between two other vehicles was stopped. And Major [REDACTED] saw the  
15 accused led away from that area wearing sweater-type clothing, and  
16 you have a picture of him and the capture video.

17 Both Major [REDACTED] and Sergeant Major A at some point walked  
18 over to the second vehicle and saw two SA-7s in this vehicle, a  
19 hatchback, both of them describing it as silver or light color. And  
20 the missiles were in this vehicle, and they consisted of missile  
21 tubes and the missiles themselves.

22 You also learned from Major [REDACTED] that the SA-7 is not in  
23 the Afghan inventory, and that the missiles themselves--here we have

1 a training mock-up--was missing something that's actually on this  
2 mock-up that's significant. What was missing is this part here, the  
3 trigger mechanism and the battery pack. But the tube and the  
4 missiles themselves were in the car. The missing trigger mechanism  
5 will become important in a moment when we talk about this further.

6 Major [REDACTED] described that there were al Qaeda fighters in  
7 the Takteh-Pol region, and that al Qaeda was attempting to defend  
8 Takteh-Pol and Kandahar near the airport, also near al Qaeda's Tarnak  
9 Farms. Major [REDACTED] described these fighters, these al Qaeda  
10 fighters, as tenacious.

11 Major [REDACTED] also said that the battlefield in the area and  
12 the airspace in the area was completely controlled by the United  
13 States and coalition aircraft flying. The only possible target for  
14 the SA-7s would be American and coalition aircraft and American and  
15 coalition air crews.

16 What else did we learn from Major [REDACTED] and Sergeant Major  
17 A? We learned that the accused was captured, he was held, and that  
18 Sergeant Major A seized from Hamdan's vehicle several important  
19 things--one of which I hold in my hand right now: The brevity cards  
20 --out of Hamdan's vehicle, also a Yemeni passport, as well as cash.  
21 You saw the accused on his capture video. He was evasive, not fully  
22 forthcoming, didn't do very much. Had he confessed within the first

1 24, 72 hours, he might have provided some tactical information, but  
2 he did not. The interrogation stopped because it was going nowhere.

3 But he did make one admission, and you see it on the  
4 screen. The accused, as part of the unlawful purpose of this second  
5 conspiracy, in response to the question: And there were missiles  
6 also in the car? He said, "Yes." And that's only one capture of the  
7 video. You may recall that he said that several times during the  
8 course of the video capture that was played in its entirety to you.

9 How do we know the accused knew the unlawful purpose of  
10 this agreement, the second conspiracy, was unlawful? You can point  
11 to several factors. He was highly evasive during the questioning.  
12 He only begrudgingly admitted there were missiles in the car he was  
13 driving. The fact that he admitted to having the missiles is  
14 certainly no proof of innocence; it's proof of guilt. He possessed  
15 the missiles and he transported them in a car; whether it was  
16 borrowed or not, he was the one that had them.

17 He knew his actions were unlawful. You can conclude in  
18 many ways by the way he answered the interrogators' questions. He  
19 never once at any time listed any person on this plan who is  
20 connected to him. He didn't say--in fact, he even said his family  
21 didn't know he was in Afghanistan, would not identify another person  
22 who we could locate was connected to him. He did say the car  
23 belonged to an individual by the name of Abu Yasser in an effort to

1 distance himself from the missiles inside, and he did that, the  
2 government would submit, because he knew the purpose of his agreement  
3 and his conduct was unlawful.

4           The accused knowingly committed an overt act, that is,  
5 transported one or more of the SA-7 surface-to-air missiles, in order  
6 to accomplish some objective or purpose of the agreement. What was  
7 the purpose of this agreement? It was plainly to get them to the  
8 fighters that Major [REDACTED] described in the area of Takteh-Pol, to get  
9 them to al Qaeda, to get them to the al Qaeda forces. And he wanted  
10 to get the missiles to some unknown coconspirator. And I return to  
11 the point I mentioned a moment ago that I said would be significant,  
12 the fact that the firing mechanism was missing. We've got the tubes,  
13 we have the missiles. He had to link up to another unknown  
14 coconspirator to get the firing mechanism, to get the battery pack in  
15 order to launch these missiles. He also said if you'll recall the  
16 testimony of Agent [REDACTED], that when he was captured, he was also  
17 going return to UBL, his al Qaeda leader.

18           Only the U.S. and coalition aircraft were in the skies at  
19 the time of his capture. He joined this conspiracy with the object  
20 to unlawfully and intentionally kill U.S. and coalition service  
21 members. He joined this conspiracy with the object to commit murder  
22 in violation of law and murder U.S. and coalition service members,  
23 including pilots, aircrew, passengers. It's plain from his actions.

1           Now, let's talk about the agreement needed in this second  
2 conspiracy. Once again, it's an agreement proved through his  
3 behavior, his words, a meeting of minds. There's no formality needed  
4 or required; and, it is based on all of the circumstances. You can  
5 reach this conclusion that an agreement was made by his behavior, the  
6 things he did, the things he possessed, and also the things he said  
7 on the capture video.

8           You might also want to remember the testimony of Special  
9 Agent [REDACTED], where the accused said to Agent [REDACTED] at the  
10 point of his capture that a weapon was with him, that he had a  
11 weapon. But he didn't further describe it. He simply admitted to a  
12 weapon.

13          You might also remember the testimony of Special Agent  
14 [REDACTED] who reported that, when he talked with the accused,  
15 the accused expressed concerns about November 2001, the time he was  
16 captured, and he said that he was especially concerned about  
17 airstrikes around Kandahar. That's an admission made to Agent  
18 [REDACTED] by this accused. But he didn't volunteer anything about  
19 the SA-7s to Agent [REDACTED] or the other agents.

20          The agreement is proved by his driving for al Qaeda,  
21 defending frontlines at Takteh-Pol near the Kandahar airport, near  
22 Tarnak Farms, that massive complex maintained by al Qaeda and bombed  
23 by us, the need to meet up with the unknown coconspirator with the

1 trigger mechanism who could actually fire the weapon; bringing with  
2 him the weapons permit that you recall was seized by Sergeant Major  
3 A, needed to get through Taliban checkpoints, needed to effect his  
4 role in the conspiracy; his possession of money by A, his carrying of  
5 the brevity cards with him so he could coordinate with, who? With  
6 his other coconspirators in this charged conspiracy. Brevity codes  
7 needed to keep secret by coded number things such as weapons, weapon  
8 systems, al Qaeda personnel, al Qaeda leaders, al Qaeda locations, al  
9 Qaeda tactics. These brevity codes were the aid for this  
10 coconspirator, Hamdan, to meet up with his other coconspirators to  
11 affect this conspiracy.

12           Let's talk about Charge II. Now we are going move into a  
13 series of material support charges. We have just completed the two  
14 conspiracy charges. And before I get into the substance of my  
15 discussion, let me just say as a general matter that this accused's  
16 charge--or charges--for material support are textbook classic model  
17 behavior for material support. If you are looking to check all the  
18 boxes on what material support is, he checks just about every one.  
19 And, as the Judge instructed you, you can look at these as root  
20 charges; and, for the sake of efficiency, I'll do that in my  
21 argument.

1           Providing material support for terrorists. We'll look  
2 first at Specifications 1, 3, 5, and 7, then later we'll look at 2,  
3 4, 6, and 8, as a group.

4           Providing material support. At the most basic level, he  
5 provided himself--permitted under the MCA statute, he provided  
6 himself as material support by attending training, attending training  
7 camps, driving UBL, specifically driving him before; before East  
8 Africa and after East Africa, before 9/11 and after 9/11, knowing an  
9 operation was about to unfold, before it unfolded, as you know from  
10 [REDACTED] and [REDACTED]. Providing, as part of his material support armed  
11 protective services, highly sophisticated movements, low-key  
12 movements, stealthy convoy movements using radios. He was armed. He  
13 had a plan to get UBL away if the convoy came under attack. He alone  
14 would bring UBL to safety. He knew the other bodyguards, and he knew  
15 that they would engage the attackers.

16           He's not charged as a planner of the specific attacks, but  
17 he provided the vital material support in preparation for these  
18 multiple attacks. The accused's services helped carry out terrorism.

19           Remember Special Agent [REDACTED]'s comment, one agreed to by  
20 our expert witness, Mr. Evan Kohlmann, in which Special Agent [REDACTED]  
21 agreed that Hamdan and people like Hamdan helped UBL, helped him  
22 become possible, helped him carry out his terror.

1           Now, specifically turning to the individual specifications.  
2 Under Spec 1, the accused provided himself as an al Qaeda camp  
3 trained member, driver, bodyguard, weapons transporter. Not just the  
4 two SA-7 missiles that we have talked a great deal about, but he  
5 brought other ammunition, weapons, supplies to the front. Those are  
6 his words and his admissions, and, most interestingly in that regard,  
7 at his own suggestion. You might recall when you heard that  
8 testimony; he was the one who came up with the idea, "Let's get this  
9 to the front."

10           Specification 5, providing transportation before and after  
11 East Africa, before and after 9/11. The accused facilitated  
12 communication by driving convoys in coordination with others and  
13 using radio contact.

14           Specification 3, serving as a bodyguard, providing  
15 protection, protecting al Qaeda leadership. The very inspiration of  
16 al Qaeda, the very source of its power were protected by him, keeping  
17 terror plotters alive to kill another day.

18           Specification 3 is now an attempt. It is now to be  
19 considered by you as an attempt. Attempting to provide two SA-7  
20 missiles and missile tubes in preparation for carrying out an act of  
21 terrorism. He knew that these missiles were destined for U.S. and  
22 coalition aircrews. We were the only ones in the air. He wanted to  
23 get these missiles to the al Qaeda defenders in Kandahar. This



1 bayat-pledged al Qaeda warrior is now on the field, bringing the  
2 weapons to the front.

3 Consider the testimony on this element of former FBI  
4 Special Agent [REDACTED] and Supervisory FBI Special Agent [REDACTED]  
5 [REDACTED]. [REDACTED] most succinctly tells us, and accurately so:  
6 Support terrorists, support terrorist acts. You can't get fewer  
7 words to describe exactly what was happening here. And Agent [REDACTED],  
8 perhaps providing what might have been the most chilling comment  
9 during the whole trial: Without people like Mr. Hamdan, bin Laden  
10 would enjoy no support, enjoy no protection, and would probably have  
11 been unable to elude capture up to this point. Think about that.  
12 That's the role he played.

13 Material support for terrorism. Now we are going turn to  
14 the next element under 1, 3, 5, and 7: The accused knew or intended  
15 that the material support or resources were to be used for those  
16 purposes. What purposes?

17 Spec 1. He knew that his training, driving, bodyguard  
18 services, weapons transport were all to support terrorism. For that  
19 purpose.

20 Spec 5. He knew that his transportation of UBL and other  
21 senior al Qaeda members was all to support terrorism. For that  
22 purpose.

1           Specification 7. He knew that his driving and protective  
2 services were all intended to facilitate communication and planning  
3 for terrorism.

4           Specification 3, now an attempt. The accused knew that his  
5 transportation of the two SA-7 missiles was for the purpose of  
6 attempting to use them for an act of terrorism.

7           The accused did all of this as a fully bayat-pledged inner  
8 member of al Qaeda.

9           The conduct took place in the context of and was associated  
10 with an armed conflict. All of this conduct, every bit of it, took  
11 place in the context of and was associated with an armed conflict.  
12 We know an armed conflict existed. It was a resort to force between  
13 governmental authorities; that is, the United States and coalition  
14 forces, and organized armed groups, al Qaeda. And as Judge Allred  
15 read those instructions to you, focused on only the facts that  
16 support these objective factors, all of the facts that I have  
17 mentioned and you have heard during the trial, focused on the length,  
18 the duration, the intensity of hostilities, the number killed, the  
19 number wounded, property damage, statements made by al Qaeda  
20 leadership. All of the information that was so well presented to you  
21 in the al Qaeda plan, all of those support that this activity  
22 occurred within the context of armed conflict.

1           Remember other factors that are enormously important in  
2 this case. Remember that UBL issued a declaration of war in 1996,  
3 and followed it up with a declaration against America in 1998. These  
4 documents show you that al Qaeda declared war on the United States.  
5 The U.S. was in a state of armed conflict with al Qaeda from at least  
6 1996, if not before that date.

7           And don't get trapped into whether issuance of ROE, rules  
8 of engagement, determine whether armed conflict exists or not.  
9 That's not the only factor. There are others, the government would  
10 argue, would be more important. Even the defense's own expert  
11 witness, Professor Corn, said those other factors have to be  
12 considered, especially the '96 and the '98 fatwas.

13           Turning to the specs. Spec 1. Training, bribing, acts of  
14 bodyguard protection, transportation of weapons; all of that was done  
15 while there was a resort to force between the U.S. and al Qaeda, and  
16 when all of those other objective factors were present, clearly  
17 present.

18           Spec 5. The accused served as a knowing and voluntary  
19 driver before and after East Africa and 9/11, clear times of armed  
20 conflict.

21           Spec 7. The accused transported UBL covering the time  
22 period all the way from '96 to 2001, all during hostilities involving  
23 East Africa, the COLE, 9/11, attacks, all periods of armed conflict.

1           And focus on the rhetoric, too. That's another factor that  
2 Judge Allred said you can look at when he instructed you that you  
3 could consider the statements of leaders. All through this time,  
4 this accused heard UBL call for the total destruction of the West.  
5 Al Qaeda can be taken at their word. They are at war with us, and  
6 have been for a long time.

7           Let's turn to the next group, 2, 4, 6, and 8, providing  
8 material support. The accused provided material support or resources  
9 to an international terrorist organization engaged in hostilities  
10 against the United States. The accused provided support or resources  
11 to al Qaeda, certainly an international terrorist organization. The  
12 accused knew he supported bin Laden and al Qaeda, who conducted  
13 terrorist operations worldwide. The East Africa embassy attacks were  
14 in Tanzania and Kenya; the COLE attack was in Yemen; 9/11, obviously  
15 in the U.S., New York, Washington, DC, and Pennsylvania. Al Qaeda  
16 undisputedly and tragically is international in the scope of its  
17 terror.

18           Spec 2. All of the accused's training, driving, body  
19 guarding activity, weapons transport, all of that was done by the  
20 accused fully understanding that he was working not for some local  
21 organization but one that had international terror designs.

1           Spec 6. All the transportation by the accused was  
2 conducted by Hamdan was conducted for UBL and al Qaeda engaged in  
3 terrorist activities on an international scale.

4           Spec 8. The body guarding, all done knowing the  
5 international scope of the organization. In fact, while he was body  
6 guarding he heard about the international scope of al Qaeda in the  
7 many speeches and lectures that he heard at training camps in which  
8 bin Laden repeatedly said he was calling for the destruction of the  
9 West on an international scale.

10           Now, on 4, Spec 4, now an attempt charge: Attempting to  
11 provide SA-7s to al Qaeda. Al Qaeda certainly was operating as an  
12 international terrorist organization at the time those missiles were  
13 delivered.

14           Now, keeping on with this set of 2, 4, 6, and 8, I would  
15 like to focus specifically on Specification 4 and how it relates to  
16 al Qaeda operating as an international operation worldwide.

17           Spec 4, Charge II really shows how fluid al Qaeda is as an  
18 organization and how individuals can expand their roles and take on  
19 greater responsibility. In Spec 4, with the arrow cut across the  
20 organizational chart provided to us by [REDACTED], I'm attempting to  
21 show how the accused breaks out of the bodyguard box, loosely defined  
22 as a box in this very fluid organization, goes beyond his important

1 work as a bodyguard, and now is attempting to deliver two SA-7  
2 missiles to al Qaeda.

3 This graphic shows you that his role was not confined but  
4 expanded, and it expanded because the accused was entrusted to  
5 transport these weapons for al Qaeda. He was heading to their  
6 defensive lines, bringing them to the Takteh-Pol area near the  
7 massive Tarnak Farms complex, saying to Agent [REDACTED] that his plan  
8 was to link up with Usama bin Laden. And he was clearly linking up  
9 with someone who had a firing mechanism for the SA-7s to launch these  
10 at our aircraft.

11 Al Qaeda meets all of the definitions of an international  
12 terror organization.

13 Let's do the same type of analysis resulting from  
14 Specification 2(d), dealing with weapons transport, weapons different  
15 from the SA-7s.

16 The accused also supported UBL and al Qaeda by transporting  
17 other military type supplies to al Qaeda. You learned that from  
18 Agents [REDACTED], [REDACTED], and Witness Number One, on the pika note.  
19 This accused volunteered--and, remember, he volunteered--to bring  
20 material to the al Qaeda frontlines. Beyond his own verbal  
21 admission, we have the al Qaeda, the pika note that supports that, as  
22 translated by [REDACTED], and I have read you what that says.

1           Again, as this graphic illustrates, he breaks out of the  
2 bodyguard driving important box that he holds, and becomes part of  
3 the al Qaeda frontline fighters as charged in Specification 2(d) of  
4 Charge II. He played an important and a diverse role in al Qaeda.

5           Continuing on with Specifications 2, 4, 6, and 8. The  
6 accused intended to provide such material support or resources to  
7 such an international organization. He is a key member of bin  
8 Laden's bodyguard attachment. He used two-way radios with others,  
9 armed to the teeth: Kalashnikov rifles, PK machine guns, rocket-  
10 propelled grenades. In the event that the convoy came under attack,  
11 he was destined to drive UBL away.

12           And on the attempted SA-7 delivery, look at the capture  
13 video. Consider the testimony of Major [REDACTED] and Sergeant Major A.  
14 He was part of a separate conspiracy there to get this missile and  
15 this missile tube, two of them, to his al Qaeda fighters.

16           And there is no indication, by the way, he belonged to any  
17 other organization. He was al Qaeda, bayat-pledged, al Qaeda-  
18 trained, al Qaeda-employed. He's al Qaeda, not anybody else.

19           Providing material support for terrorism, we continue with  
20 2, 4, 6, and 8. And just look at the pictures to show how he knew  
21 that such an organization engaged in terrorism. He went to Tarnak  
22 Farms. Part of the expansion of al Qaeda occurred there with EIJ.  
23 UBL's house is there. SA-7s, attempted delivery. Bodyguard,

1 transportation. Not just his words. You can look at the pictures  
2 and they tell you what's going on. And, you can listen to all of the  
3 agents who provided important information, specifically [REDACTED],  
4 [REDACTED], and [REDACTED]. And consider all of this within  
5 the context of the 1996 declaration of war against us and the 1998  
6 declaration against America.

7 Continuing on. The accused knew such organization was  
8 engaged in international terrorism. In addition to the previous  
9 photos that you saw, consider these matters: They show how he moved  
10 UBL at critical times during armed conflict, and that this terror  
11 material support occurred in the context of and associated with armed  
12 conflict. There was a conflict. There was a resort to armed forces  
13 between our government and coalition authorities and al Qaeda.

14 Look at these factors: The length of that conflict, which  
15 continues to this day; the duration, the intensity, the number  
16 killed. The number of Americans alone numbered, what, close to 3,200  
17 or about 3,200? The number of wounded. The property damage, which  
18 is staggering when you look at the al Qaeda video. And, the clear  
19 statements of al Qaeda leadership. It's proven dramatically in the  
20 East Africa attack, and after East Africa the United States was able  
21 to respond with airstrikes. It occurred before, during, and after  
22 9/11, and was all within the context of a declaration going back to



1 '96. And, of course, following 9/11 the United States launched  
2 Operation Enduring Freedom.

3 As it relates to Specification 4 of the attempt, you can  
4 see the hostilities right in the pictures below. You see the plumes  
5 of smoke from the rockets rising from al Qaeda in the Kandahar area.

6 In closing, I would note that all of my comments and  
7 inferences are drawn right from the facts. They are not coming from  
8 me; they are coming from what you heard on the stand and the  
9 documentary evidence that you see displayed before you.

10 What you learned, in addition to proving each and every  
11 element of these charged offenses, is that al Qaeda had huge aims,  
12 and aimed to take--literally, take down the West; to kill thousands,  
13 and they have; to create economic havoc, and they have. And they  
14 needed enthusiastic, uncontrollably enthusiastic warriors, like that  
15 accused right there, Salim Hamdan. He's an al Qaeda warrior. He has  
16 wounded, and the people he has worked with have wounded, the world.

17 Mr. President, members, you are the conscience of the  
18 community, and you will judge these crimes that the government has  
19 alleged. And we are confident that, when you return, you will return  
20 a verdict of guilty. Thank you for your attention.

21 MJ [CAPT ALLRED]: Thank you, Mr. Murphy.

22 Who is arguing for the defense?

1           DC [LCDR MIZER]: I'll be doing half of the argument, your  
2 Honor.

3           MJ [CAPT ALLRED]: Would you like to do half the argument before  
4 lunch, and then take the other half after lunch, then?

5           DC [LCDR MIZER]: Yes, Your Honor.

6           MJ [CAPT ALLRED]: Okay.

7           DC [LCDR MIZER]: Good morning, members. I'm Lieutenant  
8 Commander Mizer. On behalf of Mr. Hamdan and the entire defense  
9 team, I also would like to thank you for your time and attention  
10 these past two weeks. It's been a long two weeks.

11           The facts in this case demonstrate exactly what Mr.  
12 Schneider told you two weeks ago: Mr. Hamdan was a salaried employee  
13 of Mr. Usama bin Laden, paid personally by Mr. bin Laden to drive Mr.  
14 bin Laden where Mr. bin Laden told him to be driven. Mr. Hamdan, the  
15 evidence reflects, didn't even know the ultimate destination of the  
16 place he was to be driven, much less the details of planning or the  
17 execution of any terrorist attacks as has just been suggested by the  
18 government.

19           Merely being in the vicinity of a conspiracy, members, is  
20 not a crime. There is no evidence in this case to suggest that Mr.  
21 Hamdan was a member of the conspiracy, that he entered into an  
22 agreement with Usama bin Laden to attack civilians, attack civilian  
23 objects, commit murder in violation of the law of war, to destroy

1 property in violation of the law of war, and to commit terrorism.  
2 That's the crime charged in Specification 1 of Charge I that you have  
3 to find. Not that there wasn't the existence of a conspiracy. No  
4 one in the defense is going say that there wasn't a conspiracy or  
5 that those crimes were not horrific. But what there is no evidence  
6 of is that Mr. Hamdan, the driver, was involved in the planning or  
7 execution of that conspiracy. This is a classic case of guilt by  
8 association.

9           How many times have you seen those photographs of Mr.  
10 Hamdan, admittedly armed as a driver in Mr. bin Laden's presence? I  
11 encourage you to go back and play those videotapes, members, because  
12 if you blink, you are going miss Mr. Hamdan. And then the rest of  
13 the videotape focuses on actual members of al Qaeda. Mr. Hamdan goes  
14 through the film on the al-Fitr video for about two or three seconds,  
15 and then the video zooms in on Mr. bin Laden and other actual members  
16 of al Qaeda, not on the hired hands that drove Mr. bin Laden to that  
17 video performance.

18           I'm going talk to you a little bit about the facts in this  
19 case. I'm going to talk to you about the two charges under Charge I  
20 or two specifications under Charge I, the conspiracy, and then Mr.  
21 McMillan after lunch is going to talk to you about the material  
22 support for terrorism.

1           Before discussing the facts, I must remind you that the  
2 burden rests with the government to prove that Mr. Hamdan was  
3 involved in any of these crimes beyond a reasonable doubt. The  
4 government has failed to meet its burden in this case and failed to  
5 prove that Mr. Hamdan was anything more than a salaried employee of  
6 bin Laden.

7           Members, you have Mr. Hamdan's passport from Yemen, which  
8 indicates that during the five years that he was allegedly an al  
9 Qaeda warrior, the last line of defense, in the words of the  
10 government, for Mr. bin Laden, he twice left Mr. bin Laden, once for  
11 several months to get married, another time to take his ailing  
12 father-in-law on the Hajj. That suggests something less than a  
13 hardened member of al Qaeda, but suggests something else, a salaried  
14 employee. Someone that al Qaeda can do without, someone that Mr. bin  
15 Laden himself can do without.

16           You heard testimony that Mr. Hamdan was captured with an  
17 open plane ticket, a return plane ticket to Yemen. You have that in  
18 evidence. It was inside his passport. Again, the al Qaeda warrior,  
19 the last line of al Qaeda's defense, had a plane ticket home.

20           Special Agent [REDACTED] testified that Mr. Hamdan had not seen  
21 Usama bin Laden since October 7, 2001. And take a look at  
22 Prosecution Exhibit 21. That's the map that Special Agent [REDACTED]  
23 created, which has the route that Mr. Hamdan drove Mr. bin Laden in

1 his capacity as Mr. bin Laden's aide/driver. It's 47 days that Mr.  
2 bin Laden was outside of the presence of what the government calls  
3 Mr. bin Laden and al Qaeda's last line of defense.

4           You heard testimony from Special Agent [REDACTED] that  
5 Mr. Hamdan trained with small arms at al Farouq training camp for 30  
6 to 40 days, but that he became bored with it and wanted to go back to  
7 the Kandahar guesthouse where he worked as a driver. That's the al  
8 Qaeda warrior, the al Qaeda warrior that has no interest in small  
9 arms and wants to go back and work in what is in essence a hotel.

10           Mr. Murphy made reference to Mr. Hamdan being bored with  
11 Usama bin Laden's speeches, having really lost interest in these  
12 repetitive speeches about jihad and terrorism.

13           Importantly, members, not one witness sat in that witness  
14 box and told you that Mr. Hamdan ever fired a shot, that he ever saw  
15 powder, ever smelled the smoke of any fight. Not one witness ever  
16 testified that he was involved, importantly, in the planning or  
17 execution of terrorist plots. And you'll remember that Mr. Schneider  
18 and Mr. Swift asked agent after agent: Was he involved in the  
19 planning or execution of terrorist plots? And the best that they  
20 could come up with is he's involved somehow in the infrastructure of  
21 al Qaeda. The crime charged before you under Charge I is not being  
22 involved in the infrastructure of al Qaeda; it is conspiring to  
23 commit murder, those offenses that I have already discussed with you.

1 There is no evidence that Mr. Hamdan entered into an agreement to  
2 commit any act of terrorism.

3 Special Agent [REDACTED] did tell you that Mr. Hamdan tried his  
4 hand at farming at Tarnak Farms during some of that period. He drove  
5 a water truck and other heavy equipment for Usama bin Laden and for  
6 Usama bin Laden's commercial interests. And, ultimately, he served  
7 as one of seven personal drivers for a period of approximately ten  
8 months during this five-year period that is at issue in this case.

9 Members, it's important to note that Mr. Hamdan was paid a  
10 salary directly from Usama bin Laden. You heard Special Agent  
11 [REDACTED] testify that the money went from Usama bin Laden's hand to  
12 Mr. Hamdan's hand. He wasn't paid by an al Qaeda committee; he was  
13 paid as a personal employee of Usama bin Laden.

14 Interestingly enough, Khalid Sheik Mohammed, if you read  
15 his answer, says the exact same thing. He chides Mr. Hamdan for  
16 being interested only in Usama bin Laden's money, not in jihad, as  
17 Khalid Sheik Mohammed is, not in the war against the West. He was  
18 only living for this life, according to Khalid Sheik Mohammed.

19 Professor Williams described the real al Qaeda when he  
20 testified from Turkey, not what he calls the Wikipedia version of al  
21 Qaeda, which you heard quite a bit about during these past two weeks.  
22 He talked about not the version of al Qaeda that al Qaeda's  
23 propaganda machine, As Sahab, puts out, but the real al Qaeda as it

1 existed in the fall of 2001, which included a collection of civilian  
2 workers and a wall of frontline fighting force that Mr. McMillan is  
3 going talk about in a little bit. Al Qaeda had employees, UBL had  
4 employees, and in the fall of 2001, he was surrounding by a number of  
5 doctors, nurses, teachers, cooks, and, yes, drivers like Mr. Hamdan.

6 I want to talk with you for a few minutes about November  
7 24, 2001, because we have heard quite a bit of testimony about that  
8 from Major [REDACTED] and Sergeant Major A. Mr. Hamdan drove his family  
9 and another family to the Pakistan border that day. Interestingly  
10 enough, again, KSM, who has not spoken with Mr. Hamdan since that  
11 day, without prompting or suggestion describes exactly those same  
12 factors. It was on the return trip that he was apprehended by Major  
13 [REDACTED]'s forces.

14 It's important to note, there was a loaded Kalashnikov on  
15 the passenger seat of his car. You heard that through Special Agent  
16 [REDACTED]. You have those statements in evidence. Mr. Hamdan never  
17 brandished that weapon, never fired at his captors. That's the al  
18 Qaeda warrior, al Qaeda's last line of defense. He ran away and hid  
19 in a ditch. Major [REDACTED] called the al Qaeda individuals at that  
20 roadblock that day "dead-enders." They'd rather fight to the death  
21 than actually be taken alive.

22 Compare Mr. Hamdan's actions at the roadblock to the action  
23 of the other Arabs that were stopped at that checkpoint that day.

1 You heard evidence about a first car. The Arab in that car was  
2 surrounded, pulled a pin on a grenade to kill himself and those who  
3 would have been arresting him, fought to the death. Mr. Hamdan was  
4 in the second car, a loaded gun, two SA-7 missiles, apparently, and  
5 he ran away. A third vehicle arrives, three Arabs in that vehicle, a  
6 gun battle breaks out. Two of the Arabs are killed, a third Arab,  
7 Said Boujaadia, was captured. It's important to note Mr. Hamdan is  
8 not an al Qaeda warrior; he is not al Qaeda's last line of defense.  
9 He is not even a member of al Qaeda.

10 You heard testimony from Sergeant Major A and Major [REDACTED]  
11 that there were missile components in Mr. Hamdan's car, a white  
12 Toyota Corolla, as Sergeant Major A testified to. Many of the  
13 documents in the car included the raw materials for the manufacture  
14 of passports and forged documents. You heard the testimony about  
15 these photograph pictures and a number of al Qaeda related document,  
16 including the brevity cards that the government has made so much of.

17 Let's talk about the interrogation tape. I want to tell  
18 you that Mr. Hamdan largely tells the truth on that interrogation  
19 tape. He gives his interrogators his real name. He gives them the  
20 names of his daughter and his wife. The interrogator for some reason  
21 doesn't believe that his daughter's name is Fatima and his wife's  
22 name is Saboura, and they go through this through much of the  
23 interrogation. He tells the interrogators that the car belongs to



1 Abu Yasser. Now, Special Agent [REDACTED] testified that Abu Yasser is a  
2 high-ranking member of al Qaeda, one of their main facilitators, a  
3 travel agent, if you will, who forges documents and moves people in  
4 and out of the country. Remember what's found in the car, the  
5 components of forgery, forged documents and the tradecraft, if you  
6 will, of Abu Yasser.

7           Mr. Hamdan tells you on the videotape that there were  
8 missiles in the car but that the missiles were not his. He  
9 describes, if you go back and watch the tape, the conversation where,  
10 when he leaves Kandahar, he describes the conversation with Abu  
11 Yasser and he says, "There's missiles in the car," and Yasser's  
12 response is, apparently, "Don't worry about it. The papers are in  
13 the car." And Mr. Hamdan then leaves with those missiles, leaves  
14 Kandahar with those missiles in the trunk of the white Toyota  
15 Corolla.

16           I'll turn back to the missiles in a moment, but the only  
17 thing that Mr. Hamdan lies about in that situation, in that videotape  
18 is who his employer was. And, honestly, can you blame him? He saw  
19 one Arab gunned down after he attempted to pull a hand grenade, and  
20 he's being led around in chains. You saw the chains and with a bag  
21 over his head. And just imagine what Mr. Hamdan thought when he's  
22 put on his knees with the bag over his head in the presence of armed  
23 men, having seen what this Afghan force had done. And you heard the

1 testimony of Sergeant Major A and Major [REDACTED] who testified that they  
2 were supposed to remain out of sight, and it really was the  
3 appearance that this was an Afghan force. Major [REDACTED] testified that  
4 he had to intervene because he thought the Afghans wanted to kill Mr.  
5 Hamdan. There's a lot of racial hatred between Arabs and these  
6 Afghans. They consider them foreigners. Mr. Hamdan was right to  
7 fear for his life.

8           What did Colonel [REDACTED] testify to? He said that Mr. Hamdan  
9 had at Bagram said, "Please don't rape my wife and kill my family."  
10 That's indicative of Mr. Hamdan's state of mind and why he's not  
11 going to volunteer that he's a salaried employee of Usama bin Laden.  
12 But look what happens once he's assured by Colonel [REDACTED] and those  
13 individuals at Bagram Air Base, when he's assured that he's not going  
14 to be harmed----

15       MJ [CAPT ALLRED]: Commander Mizer.

16       DC [LCDR MIZER]: Yes, sir.

17       MJ [CAPT ALLRED]: I just want to remind you that Colonel [REDACTED]'  
18 testimony was in a closed session.

19       DC [LCDR MIZER]: Yes, Your Honor. I don't intend to stray into  
20 anything that is classified. I don't believe that that statement was  
21 classified, and I am going to not refer specifically to any of the  
22 details of what is classified.

23       MJ [CAPT ALLRED]: Thank you.

1 DC [LCDR MIZER]: I want to discuss, as I just said, what is  
2 contained in Defense Exhibits I through Y, 17 documents that you  
3 have. Look at the information that Mr. Hamdan provided to the United  
4 States when it mattered most, critical details.

5 I would like to focus your attention specifically to  
6 Defendant's Exhibit W, paragraph 2. It deals with weaponry. You'll  
7 also note the significant offer of cooperation that Mr. Hamdan made  
8 while he was at Bagram. Again, I'm not going have the government  
9 close this courtroom; you know what Mr. Hamdan agreed to do. You  
10 know what happened, that we squandered that opportunity, not Mr.  
11 Hamdan.

12 Your Honor, I would ask that this picture, which is Defense  
13 Exhibit 6, be published to the gallery and to the members?

14 MJ [CAPT ALLRED]: You may. Have we got this up? Good.

15 DC [LCDR MIZER]: How do we know he would have cooperated?  
16 Excuse me. Defense Exhibit C. How do we know he would have  
17 cooperated? There's Mr. Hamdan leading U.S. forces on one of two  
18 trips around Kandahar, showing the United States where bin Laden's  
19 safe houses were, where bin Laden's guesthouses were, showing us,  
20 providing us with valuable information. Remember what Special Agent  
21 [REDACTED] testified about; Mr. Hamdan offered to testify on behalf of  
22 the U.S. government against Nashiri, one of the most dangerous and  
23 wanted terrorists in the world, according to the government's

1 witnesses. He described how Mr. Hamdan hugged him tearfully good-bye  
2 at the end of their meeting.

3           Members, I focus on the cooperation because it's relevant  
4 to show Mr. Hamdan's intent to be involved in the conspiracy or to  
5 participate in the support of al Qaeda, which, again, Mr. McMillan is  
6 going to discuss very briefly. This type of cooperation suggests  
7 that Mr. Hamdan never intended to materially support terrorism, never  
8 intended to agree to commit any terrorist acts, an agreement that you  
9 have no evidence of. He is a salaried employee that, once captured  
10 by the United States, says, absolutely, "I'll help you out."

11           Now, you have heard a lot of people talking about the word  
12 "conspiracy" in the broadest of possible terms. I want you to focus,  
13 members, if you would, on the legal elements of conspiracy.

14           For Specification 1, the government must prove beyond a  
15 reasonable doubt that Mr. Hamdan entered into an agreement with the  
16 top leadership of al Qaeda to attack civilians, to attack civilian  
17 objects, and to commit murder in violation of the law of war, to  
18 destroy property in violation of the law of war, and to commit  
19 terrorism.

20           What evidence is there that Mr. Hamdan entered into an  
21 agreement? There is evidence that there was an agreement, but  
22 nothing to suggest that Mr. Hamdan was involved in that agreement.

1           The second element requires that Mr. Hamdan had known the  
2 purpose of the agreement, and joined willfully with the intent to  
3 further the unlawful purpose. What evidence, not only of Mr.  
4 Hamdan's participation in an agreement--what evidence is there that  
5 Mr. Hamdan intended to murder anyone? What evidence is there that he  
6 intended to attack civilians, attack civilian objects, those same  
7 elements that the government has to prove beyond a reasonable doubt  
8 in Specification 1 of Charge I?

9           And, finally, Mr. Hamdan must have done an overt act for  
10 the purpose of bringing about the object of the conspiracy. Mr.  
11 Hamdan had to do something to make those attacks possible. And what  
12 did he do, the actual acts? Not one witness testified that he had  
13 any part in the execution of the terrorist acts themselves. Again,  
14 the best they can do is say that he's part of infrastructure. Part  
15 of infrastructure, members, is not good enough to convict someone of  
16 some of the most heinous crimes that this country has ever  
17 experienced.

18           The government makes much about this bayat. I think it's  
19 interesting, after Mr. Hamdan helps us for almost two years, that  
20 they send down a team of two agents with the prosecutor to try to  
21 extract something that they can build a criminal case against Mr.  
22 Hamdan. Remember the first time they get his statement that Mr.  
23 Hamdan swore bayat.

1           Bayat, we heard from Evan Kohlmann, is a loyalty oath to a  
2 Muslim leader within a tribal society, something that Mr. Hamdan  
3 would do back in the Hadramout, not an oath to al Qaeda. He pledged  
4 his allegiance to his boss. And we can't make this into now an  
5 agreement to participate in terrorist attacks, an agreement to commit  
6 murder. What about that bayat says, yes, Usama, I will help you  
7 murder women and children; I will help you attack embassies; I will  
8 help you commit the crimes of 9/11? In fact, it's a conditional  
9 bayat: I will work for you as long as--there's some discussion about  
10 expelling the crusaders from Saudi Arabia and a statement about  
11 Israel.

12           So if an attack has been charged here that involves either  
13 one of those places, it's no broader than that. There's no agreement  
14 to attack the United States. There's no agreement to attack  
15 embassies in Africa. There's no oath involving in any of those  
16 things, even if it was a substitute foreign agreement.

17           Khalid Sheik Mohammed tells you that he is, in his mind,  
18 the executive director of 9/11, and again says he never would have  
19 involved someone like Mr. Hamdan in an operation like 9/11. He's a  
20 Bedouin. He insults him. He says, "I never--do you think I'm an  
21 idiot? I wouldn't involve a driver in these operations." And you  
22 know that that's correct because of the secrecy needed to pull off an  
23 operation like 9/11. If every garage mechanic and driver associated

1 with al Qaeda knew the details and was involved in the planning and  
2 execution of these attacks, it never would have happened. Khalid  
3 Sheik Mohammed tells you that these operations, to succeed, needed  
4 secrecy from counterintelligence such as the CIA.

5           Members, the government has 270 men, approximately--the  
6 exact number is secret--here at Guantanamo Bay, and they brought to  
7 you not one of those individuals to tell you that Mr. Hamdan was a  
8 member of al Qaeda, that he was involved in the planning or execution  
9 of those attacks. We have some of the members who are accused of  
10 being involved in the planning and execution of those attacks just a  
11 few miles away from here, and not one of them made an appearance.  
12 The defense had to try to get those witnesses in here, and they  
13 boldly and proudly tell you that, "I'm a member of al Qaeda. I was  
14 involved in the conspiracy, but this guy was not." That's the proof  
15 that Mr. Hamdan was not involved in this agreement, he was not  
16 involved in the planning and execution of terrorist attacks. And  
17 that's remarkably consistent with the ten law enforcement agents that  
18 the government did bring in here. Mr. Hamdan was not involved in the  
19 planning and execution of terrorist attacks. That is the very  
20 essence of the conspiracy.

21           If he's not involved in the agreement, if he's not involved  
22 in the planning and he didn't help carry it out, then why are we even  
23 here dealing with the charge of conspiracy involving Mr. Hamdan?

1           Special Agent [REDACTED] said that Mr. Hamdan just wanted a  
2 job and never sought to join al Qaeda. His words? General's driver.  
3 "We have the general's driver." Just because Mr. Hamdan knew that  
4 there was going to be an operation, had some vague notions as to what  
5 an operation was going to be doesn't mean that he was involved as the  
6 general's driver in that conspiracy.

7           What did Mr. Murphy tell you about the COLE conspiracy?  
8 Mr. Murphy told you, quite accurately, that Mr. Hamdan thought the  
9 Israeli Mossad was responsible for the COLE conspiracy. Does that  
10 sound like the words of a coconspirator, someone who has agreed to  
11 attack the USS COLE, someone who has helped achieve that attack? It  
12 does not.

13           Even if somehow under the broadest terms you could construe  
14 bayat as an agreement to participate in murder, you'll still fail the  
15 remaining two elements. Mr. Hamdan never had an intent to murder.  
16 He never took an action directly to assist in murder. KSM talks  
17 about Mr. Hamdan changing lug nuts and oil filters, and the  
18 government would have you believe that that was done with an intent  
19 to murder, he drove Mr. bin Laden with an intent to murder, and there  
20 is simply no evidence that that was the case. All of the evidence  
21 suggests that Mr. Hamdan was an employee who at times carried a gun  
22 for Mr. bin Laden but was still an employee nonetheless, not a



1 hardened ideologue, not an al Qaeda warrior, certainly not the last  
2 line of al Qaeda's defense.

3           The prosecution has similarly failed to prove any of the  
4 elements of the second specification, conspiracy to commit murder in  
5 violation of the law of war. There is evidence that suggests that  
6 there were these missiles in a white Toyota Corolla. Members, it's  
7 not a crime to possess missiles in October and November of 2001. In  
8 fact, the Judge has given you the instruction that the Taliban was  
9 the lawful government of Afghanistan, and Mr. Hamdan was captured  
10 with a permit authorizing him to transport weapons. The crime before  
11 you is not wrongfully possessing SA-7 missiles.

12           Mr. Hamdan tells you on that video interrogation that he  
13 asked Abu Yasser about, "Hey, what am I supposed to do about the  
14 missiles in the backseat of the Toyota Corolla?" Again, Abu Yasser's  
15 response was, "The papers are in the car, don't worry about it." We  
16 have that paper, it's Prosecution Exhibit 17, that weapons permit on  
17 Taliban letterhead signed by Mullah Omar.

18           Evan Kohlmann testified that the senior leadership of al  
19 Qaeda usually carried anti-aircraft missiles in their cars. We know  
20 that Abu Yasser was a senior member of al Qaeda. We know that from  
21 Special Agent [REDACTED]. Remember Colonel [REDACTED]' testimony on  
22 this part. I can't say anything more than that but remember what he  
23 talked about with respect to the armament. Look at the SECRET

1 exhibits dealing with what was contained in Usama bin Laden's  
2 convoys.

3           Special Agent [REDACTED] tells you that Usama bin Laden  
4 frequently traveled in a white Toyota Corolla. Members, I submit to  
5 you that what we captured on November 24, 2001 was a car that  
6 belonged to Abu Yasser. It was also a car that was frequently  
7 utilized by Usama bin Laden in movement of convoys, convoys that  
8 would have contained SA-7 missiles. We don't even know how long  
9 those missile components--and, again, as Mr. Murphy quite accurately  
10 pointed out, all that was in the car were tubes. The battery pack  
11 wasn't in there and neither was the launcher system. We don't know  
12 how long those missiles were even in that car. The crime isn't  
13 possession of missiles; it's transporting those missiles as part of a  
14 conspiracy to commit murder in violation of the law of war.

15           The prosecution asks you, in essence, to infer every  
16 element of Specification 2 of the conspiracy that he was transporting  
17 those missiles at all. He certainly was transporting them, but was  
18 he delivering them to a coconspirator to commit murder in violation  
19 of the law of war? And the only evidence that you have before you  
20 suggests that he was riding in a car that had missiles in it.  
21 There's not one piece of evidence that suggests that there was a  
22 conspiracy.

1           Your Honor, these are the instructions. I would just ask  
2 that these be published to the members and to the gallery.

3           MJ [CAPT ALLRED]: Certainly.

4           DC [LCDR MIZER]: Focus on the elements, members. The  
5 prosecution would ask you to gloss over the elements, but under the  
6 definition of a killing in violation of the law of war you see what  
7 it takes to kill someone in violation of the law of war. You must be  
8 killing civilians not taking active part in the hostilities; military  
9 personnel placed hors de combat by sickness, wounds, or detention; or  
10 military medical or religious personnel, not simply allied airmen.  
11 It has to be one of those three categories.

12           What evidence is there on this record before you that Mr.  
13 Hamdan was taking those missiles to anyone, much less to some unknown  
14 plot to kill civilians, to kill wounded service members, or to kill  
15 medical or religious personnel? That's murder in violation of the  
16 law of war, and there simply isn't any evidence. It's not a crime to  
17 shoot a coalition aircraft. And Mr. McMillan is going talk about  
18 that in greater depth after lunch. The enemy is allowed to shoot at  
19 us, so long as they abide by the laws of war. You heard the  
20 testimony of Professor Williams, that there was a frontline fighting  
21 unit, a fighting unit that was decimated by coalition airpower.

22           In conclusion, members, we will capture or kill Usama bin  
23 Laden. We are going to do it with the help of people like Mr.

1 Hamdan. You should not punish the general's driver today for the  
2 crimes of the general. Thank you for your time.

3 MJ [CAPT ALLRED]: Lieutenant Commander Mizer, I noticed you  
4 looking at your watch during that presentation. I didn't mean to  
5 suggest you had to finish by 1230.

6 DC [LCDR MIZER]: It's fine, Your Honor.

7 MJ [CAPT ALLRED]: But I don't want--I'm sorry?

8 DC [LCDR MIZER]: That's fine.

9 MJ [CAPT ALLRED]: You had all the time you needed?

10 DC [LCDR MIZER]: In 30 minutes I said everything that I needed  
11 to say, and we'll take up Mr. McMillan's argument right after the  
12 lunch break.

13 MJ [CAPT ALLRED]: Fair enough. Okay. Members of the Court,  
14 why don't we recess then until 1400, and continue with the defense's  
15 closing argument.

16 **[The military commission recessed at 1237, 4 August 2008.]**

17 **[The R.M.C. 803 session was called to order at 1403, 4 August 2008.]**

18 MJ [CAPT ALLRED]: Court is called to order in the absence of  
19 the members.

20 I understand there's a request from the government that we  
21 need to address before calling the members back into the courtroom.  
22 Mr. Trivett.

1           CTC [MR. TRIVETT]: Yes, sir. Although admittedly inarticulate  
2 in my last argument regarding the source of law that allows for the  
3 proposition that lawful combatants are protected under the statute  
4 against having been murdered by an unlawful enemy combatant; although  
5 I cited to some of our prior filings in regard to this, I failed to  
6 cite to the only source of law that should matter to this Commission,  
7 and that's the Military Commissions Act and the manual that follows.

8           It sets forth clearly that lawful combatants are protected  
9 from murder by an unlawful enemy combatant. Clearly, under the  
10 statute an individual--and I think Lieutenant Commander Mizer got it  
11 right, that our combatants can be targeted if in fact they're  
12 targeted in a lawful way. However, our combatants are also protected  
13 under the statute if they are targeted in an unlawful way. So in no  
14 way is their status as a combatant----

15          MJ [CAPT ALLRED]: Excuse me, just a minute.

16          CTC [MR. TRIVETT]: Yes, sir.

17          MJ [CAPT ALLRED]: I beg your pardon.

18          CTC [MR. TRIVETT]: Yes, sir. In no way does their status as a  
19 combatant take them out of the protections offered under the murder  
20 statute.

21          MJ [CAPT ALLRED]: You are referring to Military Commissions Act  
22 Section 915v.

23          CTC [MR. TRIVETT]: Yes, sir.

1 MJ [CAPT ALLRED]: Where is it?

2 CTC [MR. TRIVETT]: It is----

3 MJ [CAPT ALLRED]: Fifteen. Murder in violation of the law of  
4 war.

5 CTC [MR. TRIVETT]: Correct.

6 MJ [CAPT ALLRED]: Okay.

7 CTC [MR. TRIVETT]: And it clearly states that any person  
8 subject to this chapter, which would be in an unlawful enemy  
9 combatant.

10 MJ [CAPT ALLRED]: Uh-huh.

11 CTC [MR. TRIVETT]: Who intentionally kills one or more persons,  
12 including lawful combatants, which is the government's position in  
13 this case, is that our allied armed forces over Afghanistan were in  
14 fact lawful combatants.

15 MJ [CAPT ALLRED]: Uh-huh.

16 CTC [MR. TRIVETT]: If they were targeted in a way which would  
17 violate the law of war, that they would be protected under this  
18 statute. We think that the Military Commissions Act is very clear on  
19 that, and the Manual for Military Commissions is consistent with that  
20 as well.

21 MJ [CAPT ALLRED]: I think that's precisely what Professor  
22 Schmidt says in his affidavit.

1           CTC [MR. TRIVETT]: Which was not provided to the government,  
2 sir.

3           MJ [CAPT ALLRED]: I beg your pardon. Then you have not seen  
4 this? It was given to the Court on Saturday when we discussed----

5           CTC [MR. TRIVETT]: No, sir.

6           MJ [CAPT ALLRED]: Okay. Well, Professor Schmidt is a world-  
7 class scholar in the law of armed conflict, who just finished a year  
8 as the Stockton Chair of International Law at the Naval War College  
9 and filed this affidavit a couple of years ago, actually, with the  
10 defense of----

11          CTC [MR. TRIVETT]: Was it prior to the Military Commissions  
12 Act, sir?

13          MJ [CAPT ALLRED]: It probably was. 2004 is when he filed the  
14 affidavit in the case of----

15          CTC [MR. TRIVETT]: Which would render it moot, sir.

16          MJ [CAPT ALLRED]: ----David Hicks.

17          CTC [MR. TRIVETT]: That would render that affidavit moot.

18          MJ [CAPT ALLRED]: Well, that's the problem. He's describing  
19 here what the international law of war says about murder by an  
20 unprivileged belligerent, which is precisely the case that we have  
21 here. And he says things such as: The offense of murder by an  
22 unprivileged belligerent, what we are calling an unlawful combatant,  
23 is likewise absent from the law of armed conflict, although the

1 underlying conduct could constitute an offense if the victim was  
2 either a civilian who had not lost his or her immunity from attack,  
3 or a combatant protected under the law of armed conflict such as  
4 those who have surrendered or are otherwise hors de combat. I'm not  
5 sure if that's the French pronunciation. But, I mean, what Professor  
6 Schmidt says here is that there is no offense under the law of war of  
7 murdering a lawful combatant.

8 CTC [MR. TRIVETT]: Yes, sir.

9 MJ [CAPT ALLRED]: Unless it's done in an unlawful way, such as  
10 a way that inflicts undue suffering or uses a prohibited weapon, or  
11 after they have entered one of these protected statuses such as hors  
12 de combat, surrendered, wounded, not carrying on the fight,  
13 shipwrecked, parachuted from a disabled aircraft. It concludes this  
14 section--I'm not sure if this is his conclusion: "Simply put, it is  
15 not a violation of the law of armed conflict to kill a combatant,  
16 even when the individual doing so lacks the combatant privilege to  
17 use force."

18 What it does is it strips the unlawful combatant of the  
19 immunity that subjects him to trial by the domestic code of the state  
20 that's detaining him.

21 So turning to the statute, it says: "Any person subject to  
22 this chapter--that would be an unlawful combatant--who intentionally



1 kills one or more persons, including lawful combatants, in violation  
2 of the law of war shall be punished."

3 And so what Professor Schmidt's affidavit does and what  
4 Professor Dinstein's book does is describe the prohibitions under the  
5 law of war against killing lawful or lawful combatants. So I think  
6 the instruction I gave is still correct.

7 CTC [MR. TRIVETT]: The prosecution respectfully disagrees, sir.  
8 If I can give a little bit of background on this.

9 MJ [CAPT ALLRED]: Uh-huh.

10 CTC [MR. TRIVETT]: Having been a prosecutor here for now five  
11 years, under the first system, under Military Commissions Instruction  
12 Number 2, the President has listed out what he felt was the accurate  
13 representation of violations of the laws of war. Now, that was going  
14 to be hotly litigated between the prosecution and the defense, and  
15 both sides sought evidence of whether or not in fact something  
16 existed under the violation of the law of war, you know, prior to the  
17 Military Commissions Act. However, Under Article I, Section 8,  
18 Congress has the authority to define and punish offenses against the  
19 law of war.

20 MJ [CAPT ALLRED]: Uh-huh.

21 CTC [MR. TRIVETT]: This was put in detail in the Hamdan  
22 decision as well, where the plurality said that conspiracy is not a  
23 violation of the law of war absent a Congressional finding that it

1 is. I can't find evidence that it's not. Clearly, Congress spoke to  
2 this in regard to conspiracy under their Article I, Section 8  
3 authority and said, yes, in fact, conspiracy is a violation of the  
4 law of the war. They also did that in regard to murder in violation  
5 of the law of war.

6 That's why I asked your Honor when that was dated, because  
7 that may have been legitimate evidence based on litigation when there  
8 was no certainty from Congress on what a violation of the law of war  
9 is. However, after October 2006, it's crystal clear, and Congress  
10 has determined in fact in the Military Commissions Act, that  
11 murdering lawful combatants by unprivileged belligerents is a  
12 violation of the law of war. That's their constitutional duty and  
13 prerogative to do so, and they have done so.

14 So while the prosecution certainly apologizes for not  
15 catching this earlier, in the end, the positions that we articulated  
16 on the 802 on Saturday and then earlier today still remain: That  
17 Congress has spoken on this issue, and the Military Commissions Act  
18 is the law, and this Commission is bound to follow the law.

19 MJ [CAPT ALLRED]: I agree with you wholeheartedly with the  
20 last, but we have got a dispute about what Congress said. The  
21 statute they passed criminalizes murder that violates the law of war.  
22 Professor Schmidt's affidavit doesn't discuss the first or the second  
23 Military Commissions Acts, or whatever they were called, nor does it

1 discuss the President's findings. It discusses the Hague Convention,  
2 the Geneva Conventions, Article I--I mean, Protocol I of the Geneva  
3 Conventions, that the St. Petersburg Declaration Conventions. I  
4 mean, he's discussing the law of war, and----

5 CTC [MR. TRIVETT]: As he understood it to be as a law of war  
6 scholar.

7 MJ [CAPT ALLRED]: Okay. I'm not going to give the instruction  
8 you are requesting.

9 CTC [MR. TRIVETT]: Yes, sir.

10 MJ [CAPT ALLRED]: And it's not because it's untimely.

11 CTC [MR. TRIVETT]: Yes, sir.

12 MJ [CAPT ALLRED]: Because I always want to do the right thing  
13 even if it's untimely. But I simply don't agree that Congress has  
14 criminalized what you claim they are criminalizing. What they have  
15 criminalized is a murder that violates the law of armed conflict.  
16 And Professor Schmidt and Professor Dinstein have made it clear that  
17 the law of armed conflict doesn't criminalize the killing of a  
18 combatant if it's done even by an unlawful combatant. So maybe a  
19 different judge will see this differently.

20 CTC [MR. TRIVETT]: Yes, sir.

21 MJ [CAPT ALLRED]: The fact that my instructions may serve as a  
22 pattern for other cases to be tried doesn't mean that they won't be  
23 corrected if they are incorrect or that they'll be seen differently

1 by another reader of the law. But it seems that murder in violation  
2 of the law of war means a murder of someone in unauthorized fashion  
3 using an unauthorized weapon, or those who have left the combat by  
4 becoming wounded, disabled parachuting, or medical or religious  
5 personnel.

6           Professor Schmidt, once again referring to the point you  
7 are making here: "There is but one law of armed conflict consequence  
8 of direct participation in hostilities. That is, they lose the  
9 protection from attack they would otherwise enjoy pursuant to the law  
10 of armed conflict. Thus, it is not a violation of the law of armed  
11 conflict for combatants to use force against civilians"--that's not  
12 the part I needed to--"absent this immunity that goes with being a  
13 lawful combatant," I guess is he where he concludes, "the  
14 unprivileged belligerent who kills a combatant"--that's what you are  
15 charging here--"is subject to prosecution for murder pursuant to the  
16 domestic law of states with subject matter jurisdiction over the  
17 offense. There being no such crime under the law of armed conflict,  
18 domestic law offers the sole basis for prosecution."

19           Okay. So that's now the Military Commissions Act.

20           CTC [MR. TRIVETT]: Yes, sir.

21           MJ [CAPT ALLRED]: Which criminalizes murder in violation of the  
22 law of war. I mean, it's not just a murder that's a violation, but  
23 one that is violating the law of war.

1           CTC [MR. TRIVETT]: Yes, sir. And I think the government's  
2 position in that regard is, if an individual is not a member of a  
3 state army, and if he's not wearing a rank that can be seen at--a  
4 distinctive symbol that can be seen at a distance, and that he  
5 doesn't comport with--or, if he does not comport with the laws of  
6 war, then he is taken out of any belligerent privilege that he may  
7 have held.

8           MJ [CAPT ALLRED]: Uh-huh.

9           CTC [MR. TRIVETT]: And that any action that he takes as a  
10 belligerent after that is all unlawful and would violate the law of  
11 war.

12          MJ [CAPT ALLRED]: Okay.

13          CTC [MR. TRIVETT]: It's without that belligerent privilege.

14          MJ [CAPT ALLRED]: Okay. I'm sorry; I don't see it that way.

15          CTC [MR. TRIVETT]: Yes, sir.

16          MJ [CAPT ALLRED]: And I appreciate you bringing it back to my  
17 attention, and I'm sorry you didn't get this on Saturday. We talked  
18 about it, and the defense handed this to me.

19          CTC [MR. TRIVETT]: Yes, sir.

20          MJ [CAPT ALLRED]: And this was the point in the discussion at  
21 which I said, Professor Schmidt was a colleague of mine at the  
22 Marshall Center.

23          CTC [MR. TRIVETT]: Yes, sir.

1 MJ [CAPT ALLRED]: I have great respect for his opinions. And  
2 so you should have gotten a copy of this that day so this wouldn't  
3 come up at the last minute.

4 CTC [MR. TRIVETT]: Yes, sir.

5 MJ [CAPT ALLRED]: But even if it were the last minute and I  
6 thought you were right, I would make the members wait, I would craft  
7 the correct instruction, and I would change the instruction I gave.

8 CTC [MR. TRIVETT]: Yes, sir.

9 MJ [CAPT ALLRED]: My sense is that Professor Schmidt is right,  
10 and that murder in violation of the law of war is not the same as  
11 killing any lawful combatant.

12 So I may be wrong on that. That's the chance I take  
13 sitting up here and calling the shots, but for the next case around  
14 maybe you all can ask Professor Schmidt to take another whack at this  
15 in light of the Military Commissions Act and see if he says something  
16 differently.

17 CTC [MR. TRIVETT]: Thank you, sir.

18 MJ [CAPT ALLRED]: Thank you. Thank you for bringing this up.

19 Do you want to take a look at this? Maybe it's too late  
20 now, but I would like to share it with you.

21 CDC [MR. MCMILLAN]: I apologize, your Honor. I thought that  
22 the prosecution had a copy of that from way back when.

1 MJ [CAPT ALLRED]: Well, I thought when we discussed it on  
2 Saturday and you proposed the instruction that I ended up giving,  
3 that the prosecution was involved in that discussion and kind of  
4 concurred that that was a correct statement of the law. But perhaps  
5 they didn't. Perhaps they didn't see what you were relying upon.

6 So I think for the present I will not give a different  
7 instruction than what I have given. And I will call the members back  
8 here to hear your closing argument.

9 Okay. Thank you very much for bringing that up and trying  
10 to help me get it right. Okay. We'll ask the members to return.

11 BAILIFF: All rise **[all persons did as directed and the members**  
12 **entered the courtroom].**

13 **[The R.M.C. 803 session terminated and the military commission**  
14 **commenced at 1413, 4 August 2008.]**

15 MJ [CAPT ALLRED]: Please be seated **[all persons did as**  
16 **directed].**

17 The members have returned to the courtroom. Thank you,  
18 members.

19 Please continue with the defense's closing argument.

20 CDC [MR. MCMILLAN]: Good afternoon, members. My name is Joe  
21 McMillan, and I'm one of the counsel for the accused, Salim Hamdan.

22 Your Honor, I would request that the documents that will be  
23 placed on this ELMO be displayed to the members and to the gallery.

1 They are all the items in evidence, the instructions, or otherwise  
2 outlines of remarks that have been made.

3 MJ [CAPT ALLRED]: Very well.

4 CDC [MR. MCMILLAN]: The purpose of my remarks here in closing  
5 are to address the second charge with which Mr. Hamdan is charged,  
6 the material support for terrorism charge. There will be inevitably  
7 a certain amount of overlap between my remarks and those of  
8 Lieutenant Commander Mizer who addressed the conspiracy charge, but I  
9 will do my best to keep those at a minimum and not waste your time.  
10 I did want begin however, by making sure that the members understood  
11 the structure of the material support charges, because they are  
12 fairly confusing as they are set out on the charge sheet.

13 There are eight separate Specifications under the material  
14 support charge, and they come in four pairs, four pairs. Each type  
15 of conduct has sort of two prongs. It's on the one hand being  
16 asserted as an act to support terrorism, and then on the other hand  
17 being alleged that it was an act supporting a terrorist organization.  
18 So you have four types of conduct, and they are outlined here on this  
19 outline which I have prepared. There are four groups.

20 The first group, Specifications 1 and 2, goes together and  
21 alleges that Mr. Hamdan supported terrorism by providing, himself, by  
22 providing personnel, himself, on the one hand, in Specification 1, in  
23 preparation for or carrying out an act of terrorism; and then, in



1 Specification 2, provided personnel, himself, to an international  
2 terrorist organization engaged in hostilities against United States.  
3 So that's the first type of conduct, providing personnel on the one  
4 hand for an act of terrorism, on the other for a terrorist  
5 organization.

6           The second group is providing SA-7 missiles. And, again,  
7 the judge has instructed that here the Specification has been changed  
8 by a ruling from the military judge due to a failure of proof in the  
9 trial that has just ended. As originally asserted, this charge was  
10 providing SA-7 missiles on the one hand in Specification 3 for an act  
11 of terrorism, that Mr. Hamdan is alleged to have known it was going  
12 to be used for an act of terrorism. In Specification 4, it is  
13 providing the SA-7 missiles to an international terrorist  
14 organization. So, again, we see this, a single type of conduct, two  
15 types of charges or two specifications: Act of terrorism, and then  
16 to a terrorist organization.

17           The same structure applies to the third and the fourth  
18 group. The conduct that is alleged to have been the material support  
19 in Specifications 5 and 6 is providing transportation services to  
20 Usama bin Laden. In Specification 5, it is for the purpose of an act  
21 of terrorism. In Specification 6, it's to intentionally support an  
22 international terrorist organization engaged in hostilities against  
23 the United States.

1           The fourth and final pair relates to the allegation that  
2 Mr. Hamdan provided bodyguard services to Usama bin Laden.  
3 Specification 7 says those services were to facilitate an act of  
4 terrorism; Specification 8 says they were providing material support  
5 for a terrorist organization. So I just wanted to make sure that you  
6 understood the sort of logic or structure of those charges and then  
7 go on to address them.

8           I will probably address them the way trial counsel, Mr.  
9 Murphy, addressed them, where the odd numbered charges, 1, 3, 5, 7,  
10 relate to services or personnel to support terrorism, and then  
11 address the even numbered charges, or Specifications 2, 4, 6, 8,  
12 which are directed towards services designed or alleged to support a  
13 terrorist organization.

14           So let me begin by addressing Specifications 1, 3, 5, 7,  
15 which are conduct alleged to support an act of terrorism.

16           The first point to make here is that there has been a  
17 complete failure of proof on the part of the government with respect  
18 to the three elements that must be proven beyond a reasonable doubt.  
19 And I wanted to show you the instruction that Judge Allred has read  
20 to you already and that will go back to your deliberation room with  
21 you. These instructions are sort of the playbook that you'll need to  
22 follow very closely.

1           This is the instruction for material support for terrorism.  
2   You'll see this language in each of the Specifications for 1, 3, 5,  
3   7, and there are three elements that the conduct constituted support  
4   to be used for carrying out an act of terrorism. The second element  
5   is an intent element; that Mr. Hamdan knew or intended the material  
6   support would be used for carrying out an act of terrorism; and the  
7   third element is an element that requires the conduct to have  
8   occurred in the context of an armed conflict. This is a law of war  
9   military commission, and it is a fundamental element of every one of  
10   these charges that the offense occur during time of war or time of  
11   armed conflict, which is synonymous.

12           The evidence that has been presented to you by the  
13   government in this case fails on each point.

14           First, with respect to element number one involving  
15   terrorism, there has been no evidence that Mr. Hamdan's conduct was  
16   intended to kill or wound protected persons, or to coerce or  
17   intimidate governments or civilian populations. Why is that  
18   relevant? Because the instructions on the law that Judge Allred read  
19   to you identified how this terrorism element is to be considered.

20           With respect to Specifications 1, 3, 5, and 7 of Charge II,  
21   that's the material support charge, terrorism is defined as the  
22   intentional killing or the intentional infliction of great bodily  
23   harm on one or more protected persons. Protected persons.

1           Now, protected persons are also defined in these  
2 instructions. And this is again classic textbook law of war  
3 doctrine. Protected persons are civilians not taking an active part  
4 in hostilities; military personnel placed outside of combat, hors de  
5 combat, outside of combat by virtue of sickness or wounds or capture;  
6 or, military medical personnel, military religious personnel.  
7 Violence directed at those categories of persons violates the law of  
8 war. However--and this is the key part of the defense of Mr. Hamdan  
9 in this case--violence directed against combatants who are fit and  
10 able and on the battlefield and engaged in combat, violence directed  
11 at combatants is not a violation of the law of war.

12           Now, how do you know that? Well, you know that because it  
13 is in the instructions as well. There is an instruction defining a  
14 military objective, what are legitimate targets in times of war under  
15 the law of war. Military objectives include combatants as well those  
16 objects which, by their nature, location, purpose, or use contribute  
17 to the opposing force's war-fighting or war-sustaining capability.

18           The point here is that a major component of the  
19 government's case is that the use of missiles or missile components  
20 to be directed at U.S. airmen or personnel would be murder in  
21 violation of the law of war. These instructions, which are a  
22 statement of law that you must apply, say otherwise.

1           Now, there has been no evidence whatsoever that Mr. Hamdan,  
2 in any of the acts alleged, either planned or executed any terrorist  
3 acts. What evidence has been presented? Well, the government  
4 brought down a string of agents, each of whom was asked the question:  
5 Is there any evidence that you have that Mr. Hamdan was involved in  
6 the planning, implementation, or the execution of a terrorist act?  
7 The answer universally was "no."

8           Strangely, that comports exactly with the evidence that the  
9 defense presented to you from some of the people present at this  
10 facility, who are admittedly members of the conspiracy charged  
11 against Mr. Hamdan. The defense witnesses--they were not called live  
12 --Khalid Sheik Mohammed and Walid bin Attash. They were not called  
13 live; however, written answers were presented to you on Friday  
14 morning. And I know the members carefully attended and read through  
15 those answers, and, with advance apologies, I would like to spend a  
16 moment or two going through some of the high points of those answers.  
17 These are not classified. These were obtained through running the  
18 questions first and then these answers second through a security  
19 officer who cleared these and unclassified these.

20           Now, I would first like to show you the answers from Khalid  
21 Sheik Mohammed, the architect of the 9/11 attack. He was asked:

22           Are you familiar with Mr. Hamdan's activities and assigned  
23 responsibilities in his association with Usama bin Laden?

1           Answer: He was a driver and an auto mechanic.

2           Question: Did Salim Hamdan ever have any role in planning  
3 or carrying out any activities that you either directed or were  
4 involved in?

5           Answer: He did not play any role. He was not a soldier;  
6 he was a driver. He was not fit to plan or execute, but he is fit to  
7 change trucks' tires, change oil filters, wash and clean cars, fasten  
8 cargo, pick up trucks. He could tighten bolts. He could select the  
9 best car maintenance shops.

10          Question: Did he have any role in the planning of attacks  
11 outside Afghanistan, attacks such as the East African embassy  
12 bombings, the attack on the USS COLE, or September 11?

13          Answer: He was not at all a military man.

14          If you believe that Mr. Hamdan had some role in such  
15 planning, please explain everything you know about it.

16          He did not play any role.

17          Question: What about the execution of attacks outside  
18 Afghanistan, including those which have been highlighted by the  
19 prosecution here, the East African bombing, the COLE, September 11?

20          Answer from Khalid Sheik Mohammed: He did not have any  
21 involvement.

1           Question: Did Mr. bin Laden have people working for him on  
2 agricultural or other projects that did not involve military  
3 activities or attacks in other countries?

4           Yes and so many.

5           Was Mr. Hamdan a bodyguard? Was he assigned as a bodyguard  
6 for Usama bin Laden?

7           Answer: He was a driver, carrying guards and Sheik Usama  
8 bin Laden. He was not a bodyguard.

9           As Lieutenant Commander Mizer already explained, Khalid  
10 Sheik Mohammed identified the sort of ideological commitments of Mr.  
11 Hamdan.

12           To your knowledge--was the question--was Salim Hamdan  
13 involved in any conspiracy with intent to plan or conduct the  
14 terrorist attacks?

15           Answer: He was not aiming for such things, whether short  
16 term or long term. He was looking for Usama bin Laden's money. He  
17 was not with the ideology of Usama bin Laden and people like him. He  
18 was only searching for pleasure and money in this life.

19           Question: Did he provide material aid and support for  
20 planning or executing terrorist attacks?

21           No--this is a repeat question--said KSM.

22           And, finally, in a summation, Khalid Sheik Mohammed offered  
23 this comment in response to no specific question. He said: Hamdan

1 was not a member of al Qaeda. Instead, he was an employee who  
2 received a salary from Usama bin Laden's personal budget, not from  
3 the al Qaeda budget, because UBL rejects to pay to whoever serves him  
4 personally from al Qaeda's budget. Also, and from the beginning, he  
5 was not among those who endorsed Usama bin Laden. Though, he goes on  
6 to say, not everyone supports bin Laden means support a military  
7 action. So many people supported Usama bin Laden worked in civilian  
8 sectors, such as agricultural projects, and have nothing to do with  
9 military activities whatsoever.

10 Now, okay, that's Khalid Sheik Mohammed. Well, why should  
11 he be believed? Interestingly enough, answers entirely consistent  
12 with KSM's answers were obtained from another high-value detainee  
13 accused of being involved in the conspiracy that Mr. Hamdan is  
14 alleged to have been involved in, answers from Walid bin Attash about  
15 whom you heard a great deal of information. There was no opportunity  
16 for these detainees, both present here, to consult. There was no  
17 opportunity for counsel for Mr. Hamdan to meet with these individuals  
18 prior to receiving these answers. There was no opportunity for them  
19 to coordinate or divine where we were going with the questions that  
20 were relevant to Mr. Hamdan's case.

21 Let me show you the answers from Walid bin Attash. Again,  
22 I know you have looked at these carefully, but they are, we would



1 submit, among the most significant pieces of evidence that will go  
2 back into the deliberation room with you.

3 Bin Attash was asked to describe what he knew about  
4 Hamdan's activities and responsibilities associated with bin Laden.

5 Answer: His activities were distinctly clear, as he was  
6 seen driving the cars, going and coming, every day. His  
7 responsibilities were those related to driving, such as mechanical  
8 and maintenance and repairs.

9 Question: Did Mr. Hamdan have any role in planning attacks  
10 outside of Afghanistan, including East Africa, USS COLE, and  
11 September 11?

12 Answer: Salim Hamdan was not involved in the planning of  
13 such attacks against the United States.

14 How do you know?

15 Well, I am personally accused--he said--of being involved  
16 in these attacks. I was close to Sheik Usama bin Laden. I am  
17 certain that Salim Hamdan is not involved in any planning.

18 Question: If you believe that he had some role, please  
19 state everything you know.

20 Answer: He did not play any role.

21 Question: Implementation or execution of attacks.

22 Same answer: He was not involved in the implementation of  
23 any attack.

1           Repeated again: What about bodyguards? Was Mr. Hamdan a  
2 bodyguard for Usama bin Laden?

3           Answer: No, he was not like that.

4           Question: Do you know if Salim Hamdan was ever asked to  
5 play that role on one or two occasions for a particular day or a  
6 particular event?

7           Answer: Yes. Such occasions were during certain days or  
8 holidays, sometimes even of members not with al Qaeda connections,  
9 like Salim Hamdan.

10           The government has made a great deal of the CNN video  
11 dating from May of 1998, indicating that this is proof beyond a  
12 reasonable doubt that Mr. Hamdan is an armed bodyguard for Usama bin  
13 Laden. But the testimony of the government's own witness, John  
14 Miller, was during his interview of al Qaeda, of bin Laden, at an al  
15 Qaeda camp someplace in Afghanistan, there was a carefully  
16 choreographed presentation, there was a show put on for the  
17 journalists.

18           What does Mr. bin Attash have to say? Yes, sometimes there  
19 could be on certain holidays or certain occasions, events of that  
20 sort.

21           Interestingly, in the closing remarks the prosecution has  
22 now backed off of the claim that the Al-Fitr video, which dates from  
23 January of 2000, depicts Mr. Hamdan in a bodyguard role. That's the

1 video, you'll recall, where he is walking through the scene dressed  
2 in white. And while he does have a radio and a weapon, that doesn't  
3 provide evidence that he is necessarily serving as a bodyguard.

4 Question: Based on your knowledge and experience, did al  
5 Qaeda have any sort of hierarchy or structure?

6 Answer, from Mr. bin Attash: There was lists that included  
7 names that were in al Qaeda organization or they were working with  
8 them, even names of workers and activities that are not military,  
9 such as agriculture project and the like of that. Also, there were  
10 lists of names that received salaries monthly from Sheik Usama  
11 regardless if they were members of al Qaeda or not. Perhaps the name  
12 of Salim Hamdan can be among those names, because he was included  
13 with the drivers that received monthly salaries.

14 The message here from bin Attash, consistent with the  
15 message from KSM, is that Mr. Hamdan is, as Lieutenant Commander  
16 Mizer explained, a salaried employee. He is not ideologically  
17 committed to a project of terrorism or jihad; he is working for  
18 wages. His boss is Usama bin Laden. The case that the prosecution  
19 has put before you is based entirely on proximity, proximity to the  
20 person of bin Laden. But proximity is neither conspiracy nor is it  
21 material support for terrorism.

22 Again, why should these individuals be believed? Well,  
23 there's a consistency in their answers in a situation where they were

1 given separately and spontaneously, without prompting, coaching, or  
2 opportunities to divine the direction that the defense was going.  
3 There's a ring of truth about those. It's for you to decide whether  
4 they ring true or not.

5 Now, but as I mentioned before, those answers are perfectly  
6 consistent with the answers of federal agents who were paraded up  
7 here in front of you indicating no evidence whatsoever that Mr.  
8 Hamdan had a role in planning or executing terrorist attacks. Was  
9 there any documentary evidence of Mr. Hamdan's role in planning or  
10 executing terrorist attacks? None. None at all.

11 The prosecution's theory on these Specifications, 1, 3, 5,  
12 7, of support for terrorism is an infrastructure theory, that Mr.  
13 Hamdan was part of the infrastructure supporting terrorist attacks.  
14 Well, there are numerous flaws with this infrastructure theory. The  
15 first is that it offends the principle of personal responsibility and  
16 attempts to impose guilt by association. The prosecution's theory is  
17 that anyone who supports the infrastructure of al Qaeda is criminally  
18 supporting terrorism. Hamdan's part of that infrastructure as the  
19 driver, he is criminally liable. Under that theory, every cook,  
20 every teacher, every farmer, every goat herder, the butcher, the  
21 baker, the candlestick maker, essentially, everyone associated with  
22 bin Laden and providing him any service whatsoever is criminally  
23 liable for material support for terrorism.

1           This is the definition of guilt by association that we  
2 reject as part of our legal tradition. It's a theory that violates a  
3 fundamental principle of criminal law, which is that you can only be  
4 held to answer for your own conduct, not for the conduct of your  
5 father, not for the conduct of your brother, not for the conduct of  
6 your fellow countryman, not for the conduct of your boss.

7           The general is a war criminal and, therefore, the driver is  
8 also? No. No, it didn't work that way in World War II; Hitler's  
9 driver was never charged with a war crime; and it does not work that  
10 way today. This is a law of war court, and the prosecution's  
11 expansive all-encompassing infrastructure theory would make those who  
12 are familiar with the law of war, people--this condition is heard  
13 from, for example, Professor Corn, this infrastructure theory would  
14 make such experts, genuine experts on the law of war, cringe. Why?  
15 Because the same specious reasoning, the same unbounded expansion of  
16 what should be deemed a legitimate target has been used in the past  
17 to justify attacks on civilians in time of war, civilians regarded as  
18 part of an infrastructure supporting a wartime economy.

19           Indeed, terrorists try to justify their cowardly attacks on  
20 civilians on similar grounds, arguing that civilians should be held  
21 accountable for the conduct of their governments, governments that  
22 terrorists may regard as their enemies. They hold civilians  
23 responsible as part of the infrastructure of a society that they

1 believe oppresses them. But that's criminal conduct. That's  
2 criminal conduct. And that hollow justification ironically bears an  
3 uncomfortable resemblance to the prosecution's infrastructure theory  
4 in this case; that any cog in the wheel, regardless of how minor or  
5 how indirect a role he or she plays, is criminally liable for the  
6 actions of others. It's a prescription in fact for holding family  
7 members liable for the crimes of the members of their family,  
8 parents, spouses, siblings, who naturally provide a certain amount of  
9 care and support for members of the family. It effectively  
10 eliminates that principle of personal responsibility. It's alien to  
11 our traditions, and it should be rejected.

12           Now, a second fatal flaw in the prosecution's  
13 infrastructure theory is that it violates the specificity requirement  
14 that is included in the instructions that Judge Allred gave to you  
15 this morning.

16           Let me again direct your attention to the instructions on  
17 the law, and this is an instruction that comes in with respect to the  
18 material support charge after Specifications 1, 3, 5, and 7, this  
19 highlighted section: To convict an accused of providing material  
20 support for an act of terrorism, the government must prove beyond a  
21 reasonable doubt that the accused knew or intended to provide support  
22 for a specific act of terrorism--a specific act of terrorism.

1            "This offense is inherently forward-looking. An accused  
2 cannot be convicted for providing material support for past acts of  
3 terrorism."

4            Accordingly, all the discussion that you have heard from  
5 the prosecution about Mr. bin Laden knowing, he learned, he was able  
6 to piece together information, overheard conversations about bombings  
7 in East Africa or the USS COLE, things that he originally thought,  
8 for example, the COLE, were attributed to Mossad. These things that  
9 he pieces together about past acts, that's not sufficient. That's  
10 not sufficient. Material support for terrorism means conduct that is  
11 designed to effect a specific terrorist event in the future, and the  
12 evidence that has been put in front of you by the government in this  
13 case is not of that sort at all.

14           In addition, the government's infrastructure theory  
15 completely eliminates the intent instruction. The intent instruction  
16 is a key part of material support. There needs to be a specific  
17 intent that the accused knew or intended that the material support  
18 would be used for carrying out an act of terrorism. Accept an  
19 infrastructure theory that he's the guy that drove around the guy  
20 that did the planning, and you effectively write that second element  
21 of intent out of the material support statute. It's your duty, of  
22 course, to apply this law, and this law means that every element  
23 needs to be proved beyond a reasonable doubt.

1           Finally, look at the third element of providing material  
2 support. This is an element that is present for every offense in  
3 front of this Commission, conspiracy and material support alike, that  
4 the conduct took place in the context of and was associated with an  
5 armed conflict. The prosecution must prove that, as every other  
6 element, beyond a reasonable doubt. They have the burden of proving  
7 that an armed conflict existed at the time of each act that they rely  
8 on to try to prove material support. They have not and they cannot  
9 carry that burden.

10           Now, it's a burden they could have avoided. They could  
11 have proceeded against Mr. Hamdan in a federal district court where  
12 charges like conspiracy----

13           CTC [MR. MURPHY]: Objection, your Honor. That's beyond  
14 evidence in this case. Other courts have no bearing on this  
15 proceeding.

16           CDC [MR. MCMILLAN]: I'll move on.

17           MJ [CAPT ALLRED]: Thank you.

18           CDC [MR. MCMILLAN]: This is a law of war court, and,  
19 accordingly, the law of war must be applied. And the law of war  
20 requires that the offenses alleged occur in the context of and during  
21 an armed conflict.

22           Now, we requested that the prosecution produce rules of  
23 engagement that would assist in illustrating when the armed forces of



1 the United States were actually engaged in conflict. The prosecution  
2 brushed that off. Their response effectively was, "Google it. Find  
3 it yourself from open sources." They put nothing into the record.  
4 They put no evidence in front of you on this vital element of their  
5 case, an absolutely indispensable element that had to be proved. All  
6 that this Commission heard were a few conclusory remarks from their  
7 expert, Evan Kohlmann, stating in his opinion that the attacks on the  
8 embassies in East Africa and the USS COLE were acts of war.

9           On cross, Mr. Kohlmann readily admitted that he is not a  
10 law of war expert. In fact, Mr. Kohlmann's expertise apparently  
11 involved downloading files from the Internet and putting them  
12 together in a manner that had questionable relevance to this  
13 defendant. This defendant did not appear anywhere in that rather  
14 inflammatory series of videotapes that were shown by the prosecution  
15 expert, Mr. Kohlmann.

16           But to return to the date on which the armed conflict  
17 began, we did take a look at that question, and the defense did  
18 submit evidence that goes to that issue. Let me show you in a  
19 summary form what that evidence is.

20           First, we have the bombings of the U.S. embassies in East  
21 Africa in August of 1998. The response from the U.S. government was  
22 it did involve a use of military force. It involved not an  
23 airstrike, as the trial counsel suggested during closing, but a

1 single launch of a set of cruise missiles followed by nothing beyond  
2 law enforcement efforts.

3 A second event on which the prosecution relies to establish  
4 an armed conflict is the attack on the USS COLE in October of 2000.  
5 Again, no military response at all this time, but law enforcement  
6 efforts.

7 The defense submitted Exhibit BB, consisting of the CENTCOM  
8 Standing Rules of Engagement. The question put to the witness Ms.  
9 Gaskins was: Anywhere in that document--which is in evidence and  
10 will be back in your deliberation with you. Anywhere in that  
11 document, is there any mention of al Qaeda? Any mention of  
12 terrorists? Any authority for U.S. armed forces to initiate status-  
13 based strikes, strikes based on an identification of who they are?  
14 Not conduct-based strikes.

15 Recall Professor Corn's testimony: Standing rules will  
16 authorize conduct-based violence against an adversary, based, that  
17 is, on threatening conduct. If that adversary threatens the force or  
18 interferes with its mission, the use of force in return is  
19 authorized. But status-based strikes, which are indicative of the  
20 existence of war or armed conflict, are where a mere identification  
21 of that individual as al Qaeda or a terrorist or the member of some  
22 enemy group allows armed forces to initiate that violence. That's  
23 indicative of armed conflict. That's indicative of whether or not

1 the individuals on the ground in the location have authority to bring  
2 force to bear at their own initiative. Any such authority given in  
3 the CENTCOM Standing Rules of Engagement up until 9/11? No. No.

4 Then, of course, we have the September 11 attacks in New  
5 York, in Washington, DC, and Pennsylvania. One week later, Congress  
6 passes the authorization for the use of military force. This is  
7 Defense Exhibit Zeta--or, Zulu. I'm sorry. This authorization for  
8 the use of force is passed as a joint resolution by the branch of the  
9 United States government, Congress that is constitutionally entrusted  
10 with declaring war, with committing the armed forces of this country  
11 into war. And what's the purpose of the authorization for the use of  
12 force? It's to authorize the use of the armed forces against those  
13 responsible for the recent attacks.

14 What happens in the weeks following the AUMF, the  
15 Authorization for the Use of Military Force? Well, the identity of  
16 the perpetrators is established. A demand is sent to the Taliban  
17 government, a de facto government in Afghanistan, a demand that the  
18 leaders of al Qaeda responsible for this horrific attack be handed  
19 over for criminal prosecution.

20 The demand is unmet. It is ignored. Accordingly, the  
21 United States government puts into process, puts into play a series  
22 of steps that move us into a state of armed conflict. Ms. Gaskins

1 described the exhibits; most of this is set out in the message  
2 traffic through Exhibit CC that is in evidence.

3           On October 2, there's an order for the evacuation of  
4 civilian personnel from Afghanistan. On October 5, there's a strike  
5 execute order instructing commanders to put forces at the ready. On  
6 October 6, rules of engagement for Operation Enduring Freedom are  
7 issued. And then the next day, on October 7, 2001, the President  
8 announces the beginning of Operation Enduring Freedom.

9           In a speech from the White House dated October 7, 2001, the  
10 President says to the nation, "Good afternoon. On my orders, the  
11 United States military has begun strikes against al Qaeda terrorist  
12 training camps and military installations of the Taliban regime in  
13 Afghanistan."

14           He goes on to explain that, "More than two weeks ago, I  
15 gave Taliban leaders a series of clear and specific demands. There  
16 was an ultimatum issued. That ultimatum was spurned. The results  
17 were warfare."

18           This is when the armed conflict began, members. This is  
19 the moment when the United States armed forces went into action.  
20 While there may have been preparatory steps taken, there was still an  
21 effort, a last-ditch effort to secure by peaceful means, to allow for  
22 a criminal prosecution, extradition and criminal prosecution of the  
23 al Qaeda leadership. That was rejected. And, by rejecting it, the

1 Taliban brought on war. The date of the beginning of the armed  
2 conflict then is October 7, 2001.

3 Now, if you consider that date, October 7 of 2001, and then  
4 refocus for a moment on one of the prosecution exhibits, Prosecution  
5 Exhibit 121, which was the map prepared by Special Agent [REDACTED] or  
6 prepared as a result of his interrogation of Mr. Hamdan, an  
7 interesting fact emerges. Here, we have what is alleged to be a  
8 driving circuit in the days immediately before and the days after  
9 9/11. It stands as one of the most important pieces of factual  
10 evidence that the prosecution has submitted that Mr. Hamdan was  
11 materially supporting terrorism or terrorist organizations. And we  
12 have, based on Special Agent [REDACTED]'s interrogation, we have a  
13 series of blue boxes, which he acknowledged were rough--they were  
14 rough. There's not a precisioning with respect to these dates, but  
15 there's about two or three dates here, there's about a week there,  
16 and so forth and so on.

17 Well, what do you see? What you see is that the last item,  
18 the last time that Mr. Hamdan is identified as being present with bin  
19 Laden is in Kabul, that's item number 10, Kabul, 10/7-10/8. Okay?

20 The driving of this, this so-called escape plan, that  
21 driving was largely complete. It was done. What we have is Mr.  
22 Hamdan in bin Laden's presence. He's in bin Laden's presence, just  
23 like he's in the possession of a missile. But being present with Mr.

1 Hamdan during a period of armed conflict does not satisfy the third  
2 element, the element of every one of these charges that the offense  
3 alleged must occur during armed conflict. This driving tour falls  
4 outside the boundaries of the commencement of the war. The  
5 commencement of the war is October 7. By October 7, according to  
6 Special Agent [REDACTED], Hamdan is simply present with bin Laden in  
7 Kabul.

8           Moreover, even if you reject that, even if you dismiss  
9 that, there is no proof that Mr. Hamdan intended his driving services  
10 to support terrorism or intended his driving services to support a  
11 terrorist organization. He was a driver for bin Laden. He had a  
12 boss; he was an employee; he was paid a monthly salary. There has  
13 been nothing but a request that you draw a huge inference that there  
14 was an intent to further terrorism or terrorist organizations, and  
15 that has simply not been proved beyond a reasonable doubt.

16           Now, we have talked a little bit already about the  
17 bodyguard Specification, or the bodyguard evidence. There is really  
18 no proof beyond a reasonable doubt that Mr. Hamdan served as a  
19 bodyguard, certainly not in the period after the beginning of the  
20 armed conflict, after October 7, 2001. Recall that the CNN video,  
21 which is the primary piece of evidence of bodyguard services, dates  
22 from May of 1998. Now, that's before John Miller even arrived to  
23 interview Mr. bin Laden. That's at a time when a hundred out of a

1 hundred Americans, according to Mr. Miller, would not even recognize  
2 the name bin Laden. The government's contention in front of this  
3 Commission is that we were at war with al Qaeda and bin Laden at that  
4 point.

5           Professor Corn very clearly explained that propaganda  
6 statements or self-aggrandizing publicity from political leaders  
7 about being at war with the United States are meaningless under the  
8 law of war. If we were at war with every crank or crackpot or  
9 dissident or self-styled, you know, army that declared war with the  
10 United States, there would be a state of constant war. It's not the  
11 law of war. The law of war does not invest those sorts of propaganda  
12 statements with legal significance.

13           Now, the prosecution also, as I mentioned, bases about half  
14 of this case on transporting weapons, transporting weapons including  
15 missile components to Kandahar, as something alleged to be in support  
16 of terrorism. But as we established at the beginning of my remarks,  
17 using weapons in warfare against combatants who are armed, equipped,  
18 and fit for battle is not a war crime. It may be a crime under  
19 domestic law, but it's not a violation of the law of war. As  
20 Lieutenant Commander Mizer indicated, the use of these weapons would  
21 violate the law of war--and this is the instruction on murder in  
22 violation of the law of war--the use of these weapons would violate  
23 the law of war if a combatant, whether lawful or unlawful, were to

1 direct his fire or kill civilians not takings part in hostilities,  
2 military personnel outside of combatant by virtue of being captured  
3 or wounded or sick, or directed against military medical or military  
4 religious personnel.

5           The government's theory of this case, however, is that  
6 transporting weapons, whether it's to the Ansars, who are the Arab-  
7 dominated fighting force that Professor Williams talks about, or  
8 whether it's to the defense of Kandahar, is itself evidence of a war  
9 crime. In other words the prosecution's contention is that, under  
10 the law of war, in Afghanistan, U.S. and coalition forces were  
11 authorized to direct their fire at Taliban and other units integrated  
12 with the Taliban; but, if they fired back, they were war criminals.

13           Well, we certainly don't want them firing back. But, under  
14 the law of war, that is not a correct statement of the situation.  
15 Directing fire at combatants in combat, unless they have been placed  
16 outside of combat by those things we mentioned, is not a war crime.  
17 In fact, the prosecution has presented almost no evidence about  
18 either where the missile components came from or where they were  
19 going. Indeed, the Specifications of the charge sheet as initially  
20 provided to you demonstrate that they had no idea--they still have no  
21 idea--where those missiles were going. And if we look at the charge  
22 sheet that was originally provided to you, for charges III and IV--  
23 these are the offenses relating to the missiles and the material



1 support charge. The allegation is that Mr. Hamdan was providing one  
2 or more SA-7 surface-to-air missiles to members of al Qaeda, Taliban,  
3 or others directly associated with said organizations. The same  
4 language appears in Specification 3, Specification 3 relating to the  
5 missiles, the allegation that Mr. Hamdan was providing one or more  
6 SA-7 surface-to-air missiles to members of al Qaeda, Taliban, or  
7 others directly associated with said organizations.

8 Well, there's three possibilities offered by the  
9 prosecution there. At least two of those three possibilities would  
10 not constitute a crime, would not be providing missile components to  
11 terrorists. The Taliban, as the Judge has provided under judicial  
12 notice, were the de facto government of Afghanistan, and the Taliban  
13 armed forces were the regular armed forces of the state.

14 Professor Brian Williams presented testimony which was the  
15 result of his study of Central Asian Jihadist movements. What did he  
16 have to say about the Taliban? Well, they are a perfectly legitimate  
17 conventional force. It's not a force that shares our ideology or our  
18 values, but nevertheless, they had an order of battle, including  
19 infantry artillery armor, they had a command structure. They  
20 reported directly to a political leadership of the Islamic Emirate of  
21 Afghanistan. They fought under a standard, a battle flag. They were  
22 identifiable in battle. These are the criteria for a lawful fighting  
23 force, and that's how they fought through the late '90s up until

1 Operation Enduring Freedom. And they continued to fight that way as  
2 a conventional fighting force, and that's why they were destroyed;  
3 because going against the firepower of the United States in  
4 conventional warfare results in the destruction of the enemy.

5           The same occurred with the Ansars. The Ansars, Professor  
6 Williams indicated, were primarily an Arab-dominated fighting force.  
7 These are some of the slides that Professor Williams prepared and  
8 showed. They were integrated into the Taliban force. They were  
9 organized into actually a preexisting Afghan unit and given the  
10 numeric designation of a former Afghan brigade, the 055 Brigade.  
11 They were regimented and had a command structure under responsible  
12 command. They were recognized in Jane's World Armies as a formal  
13 military force. And they fought as part, in fact, as an elite part,  
14 of the Taliban armed forces. Like the Taliban, they were destroyed  
15 in Operation Enduring Freedom. Why? Because at that time they were  
16 fighting a conventional war. I'm not talking about today. I'm not  
17 talking about the Taliban or other groups in Afghanistan today. We  
18 are talking about in the fall of 2001.

19           So the prosecution has offered several different  
20 possibilities for where those missiles or weapons were going, but at  
21 least two of them were not terrorist groups. They were going to the  
22 Taliban or to others directly associated with said organizations.  
23 Meaning, who? Well, presumably the Ansars.

1           The Ansar units had fallen back in the defense of Kandahar.  
2 They were assisting the Taliban in the defense of that city. The  
3 whole theory of the prosecution's case is that those missiles are  
4 moving to that city for its defense. In fact, Major Hank [REDACTED] sat  
5 here and said that he was convinced to a military certainty that  
6 those missiles were going to be used in the defense of Kandahar.

7           What the defense submits to you, members, is that using  
8 such missiles against combatants in the defense of Kandahar, as  
9 regrettable as it would be if that fire were directed against the  
10 members of our armed services, it would not be a war crime.

11           In this context, I think it's interesting to recall the  
12 prosecution expert Evan Kohlmann, when he showed video clips of  
13 surface-to-air missiles, probably Stinger missiles, provided to  
14 mujahideen forces in Afghanistan in the 1980s. And there was one  
15 clip of a missile, shoulder-launched missile destroying a Russian  
16 helicopter. And the question put to Mr. Kohlmann was: Mr. Kohlmann,  
17 is that an act of terrorism? And what was the response? I wrote it  
18 down because I thought it a quite incisive question. What was his  
19 response? "No, that's not an act of terrorism." He said, "That's  
20 paramilitary conflict." I'm not sure what paramilitary conflict is,  
21 actually. I'm not sure there's a category under the law of war for  
22 paramilitary conflict. But the key point is, it's not an act of  
23 terrorism because it's fire directed against a combatant. And it

1 does not matter what the status of the shooter is. If that person is  
2 not a combatant, they may be subject to domestic prosecution, but not  
3 prosecution under the law of war as a war criminal.

4           The other thing that needs to be borne in mind is that it's  
5 not the defense's burden to prove where the missiles were going; it's  
6 the prosecution's burden to prove beyond a reasonable doubt that they  
7 were going for terrorist purposes. And they haven't even shown that  
8 by a preponderance of the evidence much less beyond a reasonable  
9 doubt. Indeed, they haven't even ruled out the explanation that Mr.  
10 Hamdan provided at that first interrogation, which is that they  
11 weren't going anywhere; they just happened to be in the car. He was  
12 taking women and children to the border. He was taking his wife and  
13 his daughter to the border, and he was stopped on the way back by the  
14 forces associated with Major [REDACTED] at Takteh-Pol.

15           Whose car was he in? He was in the car of a well-known al  
16 Qaeda leader. We heard that from Agent [REDACTED], Abu Yasser. Who is  
17 Abu Yasser? As Lieutenant Commander Mizer explained, Abu Yasser was  
18 known to be a facilitator. He had--he was known to forge documents,  
19 forge passports to facilitate the movement of personnel in and out of  
20 the country. Is there corroborating evidence of that? Yes. The  
21 pocket litter gathered with Mr. Hamdan was filled with small  
22 passport-sized photographs. Abu Yasser's car, missile components in  
23 the car. Are they going anywhere at all? Not necessarily.

1           In sum, there has simply been no proof, no proof beyond a  
2 reasonable doubt on this element.

3           Okay. A few remarks about the support alleged for a  
4 terrorist organization. These are the Specifications 2, 4, 6, 8; the  
5 support for a terrorist organization. Well, I have two main points  
6 that need to be made. One, is that the armed conflict between the  
7 United States and al Qaeda began on 7 October 2001. There is not a  
8 shred of evidence in front of this Commission about support for al  
9 Qaeda as a terrorist organization by this defendant, Mr. Hamdan, that  
10 postdates October 7, 2001. Special Agent [REDACTED]'s testimony? He  
11 left bin Laden probably around mid-October, left bin Laden, getting  
12 back to his wife and daughter in Kandahar, attempting to get them out  
13 of the country.

14           What was the testimony of the federal agents? Repeatedly,  
15 the testimony was, and indeed the charges are, that Mr. Hamdan  
16 provided services to bin Laden. Agent [REDACTED] testified that he was  
17 paid directly by bin Laden, strangely corroborative of Khalid Sheik  
18 Mohammed's testimony in that regard.

19           Now, why is this focus on bin Laden? Why is this focus on  
20 bin Laden of interest? Well, because there is an instruction that  
21 has been given to you which requires your close attention. It's an  
22 instruction that Judge Allred read to you this morning that  
23 distinguishes between providing personal services to the member of a

1 terrorist organization versus providing services to an organization  
2 itself.

3 I direct your attention to this top paragraph: To convict  
4 the accused of providing material support for an international  
5 terrorist organization, the government must prove beyond a reasonable  
6 doubt that, in providing the material support, the accused did so  
7 knowing that the material support could or would be utilized to  
8 further the activities of the international terrorist organization,  
9 not merely the personal interests of al Qaeda's individual members.

10 There needs to be an element of proof presented to the  
11 Commission that the activities that Mr. Hamdan engaged in were  
12 directed towards furthering al Qaeda as an organization, not bin  
13 Laden as an individual. That's the meaning of that legal  
14 instruction.

15 There needs to be proof beyond a reasonable doubt that his  
16 activities were intended to further the organization or its goals,  
17 not just those of the boss. That's why, ladies and gentlemen,  
18 Hitler's driver was not prosecuted as a war criminal.

19 Now, the other point that needs to be made, I think, is  
20 that the government has recognized the problem that it has in its  
21 case. It has recognized the problem that it cannot supply that  
22 element of proof, and so it trots out two assertions, two unsupported  
23 assertions: One, that UBL is al Qaeda; that there's a complete

1 equation between these two. But consider that in light of the multi-  
2 page power point presentation from Agent [REDACTED], the flowchart, the  
3 block and line chart, many, many pages. It's an organization. Well,  
4 fine, it's an organization when we need it to be a threat; but when  
5 we need to establish that the services provided to the boss equaled  
6 the services provided to the organization, well, we can just equate  
7 the two.

8 The other thing that the government attempts to rely on is  
9 some testimony, testimony obtained the second, the third, the fourth,  
10 the tenth, the 20th, maybe the 40th time around, maybe the 40th time  
11 around by Agent [REDACTED] and Agent [REDACTED], testimony obtained  
12 allegedly that there was a pledge of bayat. Okay.

13 We heard Mr. Schneider cross-examine Mr. [REDACTED] about  
14 that point, put in front of Mr. [REDACTED] the Arabic notes that not he  
15 but that Agent [REDACTED] was taking during that interrogation, a page  
16 and a half of notes, a page and a half of notes that suddenly  
17 mushroom into 11 typewritten single-spaced pages of interrogation  
18 reports. And, lo and behold, in it is a statement that the accused  
19 pledged bayat to bin Laden, despite the fact that in the document in  
20 evidence, the 302, the interrogation summary of Special Agent [REDACTED]  
21 [REDACTED] there's a statement: Hamdan denies pledging bayat. Hamdan  
22 was approached by Saif al Adel and asked to pledge bayat. He  
23 refused.

1           Well, the 40th time around, I guess they thought they get  
2 what they needed in terms of a statement. But when it came to  
3 actually looking at the Arabic notes, it's a little less clear. When  
4 it came to putting those notes in front of Agent [REDACTED], it's not  
5 clear that he could read those or decipher those. Evaluate that  
6 evidence, then. Weigh that evidence for what it's worth.

7           But let's assume that there was such a pledge. Let's  
8 assume that Agent [REDACTED] heard it right, recorded it right, and  
9 there was such a pledge. What does it mean? It means that there is  
10 a pledge of loyalty to an individual, not to an organization. Even  
11 if a bayat was given, it's a pledge of loyalty--it's an archaic term.  
12 It goes back to tribal Arabic culture, a pledge of loyalty to a  
13 leader, not to an organization.

14           Okay. Well, I appreciate your patience. I have spoken for  
15 a long time, and I'll close. I would, however, be remiss if I did  
16 not offer a few thoughts on the significance of the proceeding here.  
17 This is the first military commission trial conducted by the United  
18 States in over half a century, since the World War II era. Since the  
19 passage of the Uniform Code of Military Justice, the UCMJ----

20           CTC [MR. MURPHY]: Objection. This is now beyond any evidence.  
21 He's talking about statutes not at issue in this Commission.

22           MJ [CAPT ALLRED]: Where are we going to this part there, Mr.  
23 McMillan?



1 CDC [MR. MCMILLAN]: Your Honor, I simply wanted to indicate  
2 that there is tremendous attention focused on the proceedings here  
3 today, given their very extraordinary and unusual nature, attention  
4 not only domestically but internationally. And it's an attention  
5 that has significance for the war on terror. It's an attention----

6 MJ [CAPT ALLRED]: Okay. You can make that point.

7 CDC [MR. MCMILLAN]: In fact----

8 MJ [CAPT ALLRED]: I am sure the members will do their duty  
9 whether there's attention focused on them or not, and I don't want  
10 this to be some kind of an undercurrent threat that they should do  
11 something they wouldn't otherwise do. But I think the points you  
12 offered to make are fair, and you may make them.

13 CDC [MR. MCMILLAN]: Your Honor, I couldn't agree--there is no  
14 doubt whatsoever in my mind that the members will do their duty.

15 The final set of comments that I think are appropriate or  
16 the point that I would like to make, that as you look at this  
17 evidence and as you apply this body of law, you hold in the forefront  
18 of your minds the values that define us as a people and that define  
19 our legal tradition. Values that are set out in the instructions the  
20 military judge has read. Values like a presumption of innocence  
21 until guilt is proven beyond a reasonable doubt; values like  
22 individual responsibility rather than guilt by association; values  
23 like equal justice under the law. These are the values that define

1 who we are and that we need to demonstrate to the world are in  
2 evidence in every American court.

3 I have no doubts whatsoever that the law as instructed by  
4 the Judge will be fairly and impartially applied. The law of war is  
5 the applicable law here. It's the law that protects our own young men  
6 and women on the battlefield. It's the law we want to invoke  
7 strongly, urgently whenever our own young men and women, God forbid,  
8 fall into the hands of the enemy. It's a law that we cannot  
9 undermine. We cannot tear the fabric of that body of law, a body of  
10 law that the United States has been at the forefront of promoting for  
11 the past century and more.

12 I'll close simply by noting that you have been instructed  
13 that the rule as to reasonable doubt stands to every element of the  
14 offense as charged; that the prosecution has not proven beyond a  
15 reasonable doubt the elements of either conspiracy or material  
16 support for terrorism. And, as Judge Allred read, each of you must  
17 now impartially decide whether the accused is guilty or not guilty  
18 according to this law under the evidence admitted in this court, and  
19 according to the dictates of your own conscience. The defense would  
20 submit that the evidence and the law require a verdict of not guilty  
21 on both charges.

22 Thank you for your patience and your attention.

23 MJ [CAPT ALLRED]: Thank you, Mr. McMillan.

1           I think I will call for a recess now before we hear the  
2 government's final closing argument. We'll stand in recess for 10 to  
3 15 minutes.

4 **[The military commission recessed at 1526, 4 August 2008.]**

5 **[The military commission was called to order at 1541, 4 August 2008.**

6 **All parties present when the commission recessed were once again**  
7 **present.]**

8           MJ [CAPT ALLRED]: Court is called to order. We'll turn this  
9 time over to the government for their closing final argument.

10          CTC [MR. MURPHY]: Thank you, your Honor.

11           Mr. President and members, the government has been  
12 anxiously awaiting to address many of the arguments of the defense,  
13 many of which cloud issues, incorrectly state the government's  
14 theory, and create a misimpression of the view.

15           And the first important one to start with is the defense  
16 has somehow in its argument attempted to mischaracterize Charge I,  
17 the conspiracy charges, and it has mischaracterized it in a way to  
18 suggest to you that this accused is actually charged with a  
19 substantive offense, that is, attacking civilians, attacking civilian  
20 objects, murder in violation of the law of war, destruction of  
21 property in violation of the law of war, and terrorism.

22           He's not charged with those substantive offenses; he is  
23 charged as a conspirator to those offenses. And there's an important

1 distinction and an analogy I think that would be helpful to make that  
2 point clear. And the analogy that the government would turn to is  
3 that of a bank robbery and the getaway driver.

4           The getaway driver joins individuals knowing that they are  
5 going commit a robbery, takes them in a vehicle, drives them to a  
6 bank. Doesn't go into the bank; robs the bank--knows they robbed the  
7 bank and return, and he drives them away. Under those facts, that  
8 individual is a conspirator. He didn't commit the bank robbery  
9 directly, but he joined others in committing a conspiracy. He did  
10 his part, which is driving a car to rob the bank.

11           You could expand that analogy. Say the bank robbers called  
12 a taxi company and told the taxi driver, "We are robbing a bank."  
13 The robber goes in, robs the bank, returned, and did it multiple  
14 times. Well, if that taxi driver came into court and said, "You  
15 know, I was there just for the wages. I'm not involved in this, I'm  
16 just there for the wages," that would not be a valid defense, because  
17 if you knowingly join a group of individuals understanding that they  
18 are about to commit a crime, you have signed up for what you  
19 knowingly did. And, in the case of Mr. Hamdan, he knowingly signed  
20 up to assist coconspirators who were committing the enumerated  
21 offenses.

22           The government has never suggested--and we stated this in  
23 our opening to our closing argument--that he was an actual planner,

1 that he was a mastermind. We've never said that. And when I was  
2 before you a moment ago, I made that clear.

3 What we have said to you is that he was a coconspirator,  
4 and he did his part, his driving, his body guarding, his protective  
5 service, his low-key movements, his shell game of moving bin Laden  
6 around knowing that an operation was about to unfold, understanding  
7 that that operation included terrorism, and seeing the results of it  
8 not once but multiple times, after East Africa, after 9/11. He knew  
9 what he was doing, and he is properly charged as a coconspirator to  
10 that offense.

11 So don't let the defense confuse you to think that we have  
12 somehow charged him with substantive offenses. We have not. In  
13 Count 1, we have charge him properly as a coconspirator to this  
14 offense. And I have given you a plethora of facts that shows you how  
15 he committed overt acts in support of the charged conspiracy.

16 Now, the defense also seems to rely heavily on two high-  
17 value detainees, Khalid Sheik Mohammed, KSM, and bin Attash. And  
18 they also use them in a way to confuse you on the very same issue,  
19 getting at questions like, was he a planner? Did he execute? Well,  
20 the government would make a couple of points. First of all, these  
21 are terrorists who are out to hurt America, and you should look at  
22 their answers as such. The government never had a chance to cross-  
23 examine these individuals to show their true bias. But what they did

1 admit to is that Hamdan did all the things we charged him with in the  
2 conspiracy. And being a driver is an important part of his  
3 contribution to this conspiracy. That's proved up through some of  
4 the statements of KSM and bin Attash.

5 Don't be confused by the defense who is trying to make you  
6 believe the government has overcharged the accused or mischarged the  
7 accused. We have not. We have charged him properly within his role  
8 of a conspirator acting with coconspirators, and not more. And it's  
9 the effort by the defense to say we have overreached that creates  
10 that misimpression.

11 Now, some other points that I want to tick through that  
12 were raised was, there was a claim that Mr. Hamdan only worked with  
13 UBL for a short period of time. In fact, he worked with him from '96  
14 through 2001. He departed him twice, once to get married, and once  
15 to go on a Hajj. And each time he returned, returned knowing exactly  
16 what Usama bin Laden was doing with his terror activities.

17 On the issues of the missiles to Kandahar, it's  
18 preposterous to think that this accused was taking those missiles  
19 anywhere else other than to al Qaeda. He got the car to drive there  
20 from an al Qaeda operative. He was heading towards Tarnak Farms, an  
21 al Qaeda stronghold. He was shown to be part of no other  
22 organization other than al Qaeda, and he told Agent [REDACTED], when he  
23 was captured, he was then going to be going on to UBL, himself. He

1 had \$1,900, he had the missiles in the car, he had forged documents.  
2 He was heading to Kandahar to meet up with someone with a mechanism  
3 to fire that missile.

4 On the issue of bayat, the defense really tries to minimize  
5 that, don't they, saying that it's only some sort of pledge of  
6 loyalty? But when they leave it at that, they are really leaving out  
7 a lot of the evidence. The admission that he pledged bayat to Agent  
8 [REDACTED], which was made plainly and clearly to you, showed that this  
9 accused signed up for being willing to attack the crusaders. And, by  
10 that, he means the West, including Americans and coalition forces,  
11 and the Jews. And it's clear that he means to attack those people  
12 through his bayat, because he creates an exception. He says, "But I  
13 won't attack Muslims. I won't tolerate Muslim-on-Muslim attacks."  
14 But he fully signed up to be a warrior to attack the crusaders, or  
15 us. So don't let the defense try and minimize that pledge of  
16 loyalty. And when you combine that with his other statement, that  
17 when he knew of the attacks and worked with UBL he had uncontrollable  
18 enthusiasm, zeal, or passion, you know what his real intent was.

19 The defense raises issues of cooperation and talks about  
20 some examples, that's a complete red herring, in a findings hearing.  
21 Cooperation has nothing to do with guilt or innocence, which you are  
22 to decide today. Any effort to go down that discussion is to divert  
23 you from the facts of his guilt and his cooperation. Whatever it may

1 have been or however slight it may have been is not an issue of  
2 guilty or innocence. You should not be distracted on that point.

3           There were other issues that the defense raises that are  
4 important to point out. It talks about how proximity is the only  
5 thing that the government has proved in these conspiracy charges, but  
6 is that really right? Have we only shown he was there? Or did we  
7 show that he did things, things that were important to advance this  
8 conspiracy?

9           Now, I have spent a lot of time ticking through them in  
10 some detail; and I won't go through them in the great detail I did  
11 earlier, but any suggestion that he was merely present or just  
12 proximate flies in the face of all the evidence you have seen. He  
13 helped make it possible. These terror attacks could not have been  
14 carried out without the ability to transport the leadership before,  
15 during, and after the attack, and allow them to kill on another day.

16           When we proved to you that he did things like evacuation,  
17 transportation, secretive, and provided communications, and then the  
18 defense comes back and says, well, he was just there, he was just  
19 proximately around? That's not a fair characterization of the  
20 offenses or facts in this case. In fact, they even go so far as to  
21 say, well, why not charge family members? I don't know how much more  
22 preposterous you can get. We are not charging family members, we are  
23 not charging bystanders, we are not charging people that were



1   uninvolved. We are charging people that are full coconspirators,  
2   knowing, signed up, and understand exactly what's about to happen.  
3   Before East Africa and 9/11, he knew terrorism, specifically  
4   terrorism, was about to take place, and he signed up for it and he  
5   played his role.

6           On the issue of the conflict itself, the defense very  
7   conveniently tries to push that date all the way into October of  
8   2001, ignoring all of the vital facts that show that this armed  
9   conflict began far earlier. And you know from the cross-examination  
10  of Professor Corn by Commander Stone that there are many objective  
11  factors that showed that al Qaeda was at war far earlier. You can  
12  just look at the '92 Yemeni attack, the '93 Somalia attack where  
13  American soldiers were dragged through the streets; the '95 Riyadh  
14  attack in Saudi Arabia; the 1996 declaration of war, when al Qaeda  
15  really became operational, was capable of striking us, and told us  
16  they would do so. Then, the '98 declaration against America, yet  
17  another written statement from leadership saying what their  
18  intentions are. Then, the attacks of East Africa, the attack of the  
19  COLE, the attack of 9/11. Each and every example of armed conflict,  
20  not something happening way off in October of 2001, happening much  
21  earlier.

22           In essence, what the defense is saying is that armed  
23  conflict doesn't begin until we respond. So does that mean that al

1   Qaeda gets multiple free shots at us before it's considered armed  
2   conflict? Absolutely not, and it's preposterous to suggest  
3   otherwise. To rely on statutes, ROE, Presidential addresses, and  
4   say, oh, that's where we should fix that point, ignores reality,  
5   ignores the deaths that have occurred over the '90s, much earlier  
6   even in fact than we have alleged in this charge sheet beginning in  
7   1996.

8               So, to say that you should ignore all of that really flies  
9   in the face of objective reality and the factors that the  
10  instructions tell you to look at as objective factors in determining  
11  when armed conflict begins. You should feel very confident that the  
12  date we've given you, 1996, is at least the date it began. There's  
13  evidence that it began earlier.

14              Now, on the issue of the Ansars, the defense seems to  
15  create this impression that somehow there was this other group that  
16  Mr. Hamdan belonged to, that he had nothing to do with al Qaeda in  
17  his activities but, rather, he was connected to the Taliban or the  
18  Ansars. But the facts in that regard are completely otherwise.  
19  Hamdan was al Qaeda. Every fact of this case points to that. There  
20  is no fact that suggests he belonged to this Ansar group. And his  
21  only contact with the Taliban, if you recall the testimony, was  
22  occasionally to get supplies from them and take them, where? Not to  
23  other Taliban. To take them to al Qaeda. To suggest that he was not

1 al Qaeda or that he was not involved directly with them really flies  
2 in the face of all of the important factors in this case.

3 Commander Mizer made an interesting statement very early in  
4 his closing argument that I think suggests just how far afield the  
5 defense's arguments are from reality. He said--and I think I have  
6 this quote right--he never intended to join a conspiracy to kill.  
7 But that's not right. He intended to join a conspiracy to kill, and  
8 he saw it unfolding and he stayed. He knew of the violence that  
9 Usama bin Laden preached. He knew of Usama bin Laden even before he  
10 met him. He knew of the violent terrorist attack that was about to  
11 unfold before East Africa, and he remained. He heard about the  
12 attack on the COLE, learned that it was al Qaeda, and then returned  
13 to UBL. He knew before the 9/11 attacks, helped hide bin Laden, and  
14 remained. He absolutely joined this conspiracy. He didn't commit  
15 the substantive offenses, we agree on that. But he did commit the  
16 violation, the serious violation of joining a conspiracy, and he did  
17 his part to ensure that it was carried out.

18 Did the accused only provide personal services to one  
19 person, or did he provide it to an organization? Was he the personal  
20 servant of only bin Laden, or was he a conspirator with al Qaeda?  
21 The first point government would make--and these facts truly bear  
22 this out--is there's no distinction between al Qaeda and bin Laden.  
23 Bin Laden and al Qaeda are one and the same. And the fact that he

1 gets paid personally from Usama bin Laden probably cements the point  
2 more than it's a defense point for them to raise. He was out not as  
3 a personal servant of one man; he was there to serve an organization.  
4 Remember, his convoys consisted of more than just bin Laden. It was  
5 other al Qaeda leaders. He went to events and saw Ayman al Zawahiri,  
6 another senior al Qaeda leader. He saw them together. He  
7 facilitated those meetings. He defended those meetings. The fact  
8 that the defense is trying to turn this into--what would you call it  
9 --a personal service contract between two men really flies in the  
10 face of the facts.

11 Make no mistake. He was serving a terrorist organization,  
12 an international terrorist organization, not one person. And there  
13 should be no mistaking the fact that bin Laden and al Qaeda are one  
14 and the same.

15 The fact that he was paid for his services doesn't change  
16 that fact. Just like in the bank robbery, if you are paying the  
17 getaway driver and the getaway driver comes into court and says,  
18 "Well, I was only a wage earner. I only got paid to drive these bank  
19 robbers around," that's not a defense. If you know you are  
20 transporting people who are about to commit an act and you do it  
21 repeatedly, you become a coconspirator.

22 When you go back, look at the facts, the enormous number of  
23 facts the government has put forward for you to consider. Consider

1 the charges not as the defense would mischaracterize the charges, but  
2 as they really are, and ask yourself: Did he play a part in this  
3 conspiracy that was substantial? That moved it forward? Did he  
4 provide material support in support of terrorism, international  
5 terrorist groups and terrorist acts? Every fact shows that he did.

6 When you go back, don't leave your common sense behind.  
7 Consider the ways of the world; understand what this individual did  
8 as he had been charged, and the government believes that you will  
9 return, not with a clouded version of what happened or a clouded  
10 version of our theory, but a clear understanding that Salim Hamdan  
11 committed material support of terrorism offenses and entered into  
12 conspiracies. We look forward to your verdict.

13 MJ [CAPT ALLRED]: Thank you, Mr. Murphy.

14 Members of the Court, counsel for both sides have referred  
15 to the instructions that I have given you. I would like to remind  
16 you that if there is any inconsistency between their version of the  
17 instructions and what I will send back with you, my version is  
18 correct.

19 The following procedural rules will apply to your  
20 deliberations and must be observed.

21 The influence of superiority in rank will not be employed  
22 in any manner in an attempt to control the independence of the  
23 members in the exercise of their own personal judgment. Your

1 deliberations should include a full and free discussion of the  
2 evidence that has been presented.

3           After you have completed your discussion, then voting on  
4 your findings must be accomplished by secret written ballot. All  
5 members of the Court are required to vote. The order in which the  
6 several charges and specifications are to be voted upon should be  
7 determined by the President, subject to objection by a majority of  
8 the members. You vote on the Specifications under the charge before  
9 you vote on the charge.

10           If you find the accused guilty of any Specification under a  
11 charge, the finding as to that charge must also be guilty.

12           The junior member will collect and count the votes. The  
13 count will then be checked by the President, who will immediately  
14 announce the results of the ballot to the members.

15           Do you know who the junior member is? Member number nine.  
16 Thank you.

17           The concurrence of at least two-thirds of the members  
18 present when the vote is taken is required for any finding of guilty.  
19 Since we have six members, that means four members must concur in any  
20 finding of guilty. If you have at least four votes of guilty of any  
21 offense, then that will result in a finding of guilty for that  
22 offense. If fewer than four members vote for a finding of guilty,  
23 then your ballot has resulted in a finding of not guilty.

1           You may reconsider any finding prior to its being announced  
2 in open court. However, after you vote, if any member expresses a  
3 desire to reconsider that finding, open the Court, the President  
4 should announce only that a reconsideration of a finding has been  
5 proposed. Do not state whether the finding proposed to be  
6 reconsidered is a finding of guilty or not guilty. Do not state  
7 which Specification and Charge is involved. I will then give you  
8 specific further instructions on the procedure for reconsideration.

9           As soon as the Court has reached its findings and I have  
10 examined the findings worksheet, the findings will be announced by  
11 the President in the presence of all the parties. As an aid in  
12 putting your findings in proper form and making a proper announcement  
13 of the findings, you may use the findings worksheet, the next  
14 appellate exhibit in order. What's the number? 320.

15           Where's the findings worksheet? In the other room. Okay.  
16 Can the bailiff get in there to get it? Would you go in the court  
17 reporter's office and get the findings worksheet, please? Sorry  
18 about that.

19           Okay. Captain, in a moment I will show you the findings  
20 worksheet and talk to you about it. At the top of the first page  
21 will be a portion that you can use if you find the accused guilty of  
22 all charges and specifications, or not guilty of all charges and  
23 specifications. If you should reach either of those findings, circle

1 the word you intend to be applied, cross out the word you don't  
2 intend to apply so on the face of the document it's clear to you and  
3 to the Court what your finding is.

4           Would you show that to the senior member, please? Has it  
5 been marked? I'm sorry, let's mark that.

6           The second part of the worksheet will be used if you find  
7 the accused guilty of some and not guilty of other specifications.  
8 You will notice that under Charge I, Specification 1, for example,  
9 the worksheet gives you the opportunity to find him either guilty or  
10 not guilty of each of the alleged conspiracies and the overt acts  
11 alleged. So, for example, you might find that he was a driver but  
12 that he wasn't a bodyguard, and so you would reflect that  
13 appropriately by circling guilty or not guilty on the worksheet.

14           Some of the specifications give you the opportunity to  
15 enter findings by exceptions and substitutions. If you find that all  
16 of a specification has been proven except a phrase or a number or  
17 some language, in announcing your findings you will say, "We find you  
18 guilty except for," the words that you found not to have been proven  
19 beyond a reasonable doubt. If you need to substitute a different  
20 number, then you may except the number you found not to be applicable  
21 and substitute a different number. For example, the beginning date  
22 of the armed conflict is an area where you might decide that February  
23 of 1996 was not the date and some other date was.



1           Do you feel like you understand how the portions permitting  
2 you to reflect findings by exceptions and substitutions might be  
3 used?

4           PRES: Yes, sir.

5           MJ [CAPT ALLRED]: Very good. The worksheet in no way indicates  
6 an opinion by me or counsel concerning the findings you should reach  
7 or any degree of guilt of this accused. It is merely included to aid  
8 you in understanding what findings might be made in this case, and  
9 for no other purpose whatsoever.

10           Are there any questions about the findings worksheet?

11           PRES: No, sir.

12           MJ [CAPT ALLRED]: Once you have finished filling in what is  
13 applicable, please line out or cross out everything on the form that  
14 is not applicable so that when I check your findings I can ensure  
15 they are in proper form.

16           If during your deliberations you have any questions, please  
17 write them on one of the question forms that have been provided to  
18 you. The bailiff will bring it to me; I will assemble the parties in  
19 the courtroom, and try to answer your question.

20           The Manual for Military Commissions prohibits me and  
21 everyone else from entering your closed-session deliberations. You  
22 may not consult the Manual for Military Commissions or any other  
23 legal publication unless it has been admitted into evidence. The

1   bailiff may enter from time to time to receive communications from  
2   you, if you wish to send out a question or announce that you are  
3   ready for a recess or something.

4               Any questions about the instructions I have given you so  
5   far?

6               PRES:   No, sir.

7               MJ [CAPT ALLRED]:   Are there any objections from either side to  
8   the instruction as given?

9               TC [LCDR STONE]:       No, sir.

10              DC [LCDR MIZER]:   None from the defense, sir.

11              MJ [CAPT ALLRED]:   Okay.   Bailiff, will you hand that to the  
12   senior member, please?

13   **[Bailiff did as directed.]**

14              MJ [CAPT ALLRED]:   If it is necessary, your deliberations may be  
15   interrupted by a recess, for example, to use the restroom.   Before  
16   you leave your closed-session deliberations, you must notify us; we  
17   must come into the courtroom, formally convene, and then recess the  
18   Court.   After the recess, we must reconvene the Court and formally  
19   again close for deliberations.   With this in mind, Captain, do you  
20   think you would like to take a recess before we begin deliberations,  
21   or are you ready to close now and begin your deliberations?

22              PRES:   Sir, you are saying close for the--at this juncture?

1 MJ [CAPT ALLRED]: We are ready to close for deliberations. We  
2 are all going on recess.

3 PRES: Right.

4 MJ [CAPT ALLRED]: When you close for deliberations.

5 PRES: Okay.

6 MJ [CAPT ALLRED]: So we'll be able to use the restroom or take  
7 a smoke or get some coffee.

8 PRES: And then----

9 MJ [CAPT ALLRED]: If the members would like to do that before  
10 they close for deliberations, let me know now and we will take a  
11 recess that includes you.

12 PRES: Yes, sir, we would.

13 MJ [CAPT ALLRED]: Okay. That sounds fair to me.

14 Okay. Now, the Prosecution and Defense Exhibits that have  
15 been admitted into evidence will all be available to you in your  
16 deliberations room. Some of them are SECRET documents which will be  
17 brought to you in hard copy, others are various maps, photos, images  
18 of various kinds. We'll have to figure out how to bring them to you.  
19 There are several hundred pages, and right now they are in an  
20 electronic format. So we'll work on that, and get them to you as  
21 soon as we figure out how to do it.

1           Please do not mark on any of the exhibits except for the  
2 findings worksheet on which you will record your findings. Sign at  
3 that the bottom when you have reached a verdict. Fair enough?

4           PRES: Yes, sir.

5           MJ [CAPT ALLRED]: Okay. We'll take a recess, and reconvene in  
6 the courtroom in about ten minutes.

7           **[The military commission recessed at 1611, 4 August 2008.]**

8           **[The military commission was called to order at 1620, 4 August 2008.**

9           **All parties present when the commission recessed were once again**  
10 **present.]**

11          MJ [CAPT ALLRED]: Court is called to order. Members of the  
12 Court, you don't need to sit down if you don't want to. Are you  
13 prepared to close now and deliberate?

14          PRES: Yes, sir.

15          MJ [CAPT ALLRED]: Very well. The Court is closed. The members  
16 can retire and deliberate.

17                 Mr. President, may I suggest that 1700, 1730, whenever you  
18 are comfortable, you might want to recess for the evening and come  
19 back tomorrow morning. So let us know when you feel like you are  
20 ready to recess, and we'll adjourn for the day.

21          PRES: Yes, sir.

22          MJ [CAPT ALLRED]: Okay. Thank you. We'll wait to hear from  
23 you.

1 [The members departed the courtroom.]

2 [The military commission terminated and the R.M.C. 803 session  
3 commenced at 1622, 4 August 2008.]

4 MJ [CAPT ALLRED]: Okay. Please be seated. Let's see, we have  
5 a couple of items to discuss outside to presence of the members.

6 Mr. Trivett, I would like to thank you again for bringing  
7 that issue to my attention regarding the law of war. I want to make  
8 sure the instructions are correct. I lay awake last night and got in  
9 early this morning trying to make sure they are correct; and even  
10 though it was late, I'm glad you brought your argument forward and  
11 tried to get me to do the right thing, because that's an important  
12 part of my job.

13 I have given some additional thought to your request for  
14 that instruction during the balance of the arguments, and I notice  
15 that under the Manual for Military Commissions on page 4-12, which  
16 lists the elements of murder in violation of the law of war, element  
17 number 5 is that the killing was in violation of the law of war.  
18 This reinforces my sense that somehow Congress intended to  
19 incorporate principles of the law of armed conflict into this  
20 offense, and that the instruction I gave the members was correct. I  
21 hope that's so.

22 Now, I still have pending a motion to give Mr. Hamdan  
23 credit for pretrial confinement and some other pretrial confinement

1 related issues. This morning I received from the government an  
2 affidavit of Colonel Vargo and some other associated papers, and I  
3 understand that the defense has something as well.

4 CDC [MR. SWIFT]: I thought it had been submitted. We have  
5 submitted an affidavit from myself, along with the logbooks for Camp  
6 Echo over the period of time.

7 MJ [CAPT ALLRED]: Did you bring that----

8 CDC [MR. SWIFT]: I believe that's been submitted to the Court.

9 MJ [CAPT ALLRED]: By hard copy or by----

10 CDC [MR. SWIFT]: E-mail.

11 MJ [CAPT ALLRED]: I'm sorry. I didn't receive it, if it was,  
12 and so I would ask you to bring it to me again. Just go ahead and  
13 make a hard copy, if you would.

14 CDC [MR. SWIFT]: We'll make a hard copy and have it delivered  
15 to you. Again, the hard copies were delivered, was sent by e-mail,  
16 the affidavit itself. Because documents with the affidavit were  
17 references are classified, they are hard copy documents, and we could  
18 not get them.

19 MJ [CAPT ALLRED]: Okay. Well, wherever you took that package,  
20 let's try to track that down. I would like to start taking a look at  
21 that while the members are deliberating.

22 I understand that Mr. Hamdan is going make a telephone call  
23 this afternoon; and so, when the members return from deliberations

1 and when we recess for the night, that Mr. Hamdan might be absent  
2 from that session of court. Is that according to the defense's  
3 desire, so that he can be excused now to go make his telephone call?

4 CDC [MR. SWIFT]: Provided that the Court explains to the  
5 members that Mr. Hamdan is out making a phone call.

6 MJ [CAPT ALLRED]: Of course.

7 CDC [MR. SWIFT]: Rather than his being absent as interpreted as  
8 some sort of an "I don't care."

9 MJ [CAPT ALLRED]: Okay. I'll be happy to do that. I'm just  
10 trying to accommodate your wishes and his interest in calling his  
11 family. So I'll make that announcement, if you'll remind me, when  
12 the members are called back in.

13 The next item, I understand that the transcript of the  
14 testimony of Colonel [REDACTED] and Lieutenant Colonel [REDACTED] has been  
15 completed. It's being reviewed by the security reviewers now for the  
16 redaction of classified portions. Hopefully, we'll have that to  
17 release to the press and the public soon. I don't know how big a job  
18 it is to do that redaction.

19 Now, the last topic I wanted to discuss is the delivery of  
20 exhibits to the members. Many of these are hard copy classified,  
21 which will be delivered to them in hard copy, but many more are  
22 digital photos, other things that were displayed on the ELMO or

1   whatever and were captured by the court reporter in her electronic  
2   file there.

3               What I think will happen is that a computer will be  
4   delivered to the members' deliberation room and a disk that has all  
5   those exhibits on it, and it will be connected to a big screen TV so  
6   that they can all see the exhibits at the same time. As long as the  
7   parties are satisfied with that, I don't see the need to print off  
8   several hundred pages of things, especially not six copies of several  
9   hundred pages, and then we'll just leave it to the members to find on  
10  the disk whatever they are looking for, open it up, display it to  
11  themselves; and if they want help, we can sent the court reporter in,  
12  if the parties are comfortable with that as well.

13       CDC [MR. SWIFT]: I'm certainly willing to give it a try. And I  
14  think that they probably are computer savvy enough to make it all  
15  run, with the proviso that if they have questions or they can't find  
16  something, they send out a question, rather than send in someone to  
17  help pull it.

18       MJ [CAPT ALLRED]: All right. We'll see if we can make that  
19  work.

20       TC [LCDR STONE]: I think we can make it work, sir.

21       MJ [CAPT ALLRED]: Commander Stone, is there anything else you  
22  would like to raise before we recess, then?

23       TC [LCDR STONE]: No, sir.



1 MJ [CAPT ALLRED]: Commander? Professor?

2 CDC [MR. SWIFT]: Since you have not yet had an opportunity to

3 look at my affidavit or any of the other parts, I'll save that for

4 the morning until you have had the opportunity.

5 MJ [CAPT ALLRED]: Do you want to make additional argument on

6 that motion? Or just----

7 CDC [MR. SWIFT]: I do, in light of the discovery that we had

8 and in light of the case that we received. But I would rather you

9 have the opportunity to see it first before I argue it rather than--

10 MJ [CAPT ALLRED]: Okay. Why don't we do that tomorrow at some

11 point while the members are deliberating. If I can review those

12 materials tonight, we can----

13 CDC [MR. SWIFT]: Perhaps, first thing in the morning after they

14 come back in.

15 MJ [CAPT ALLRED]: Okay.

16 CDC [MR. SWIFT]: Or if they have already reached a verdict,

17 then during a short break. Well, I count for----

18 MJ [CAPT ALLRED]: You are hoping for the best, aren't you?

19 CDC [MR. SWIFT]: As a defense counsel, I consider all

20 possibilities.

21 MJ [CAPT ALLRED]: Well, that sounds good to me, too. Okay.

22 We'll recess then until the members are ready to come back into the

23 courtroom.

1 [The R.M.C. 803 session recessed at 1627, 4 August 2008.]

2 [The military commission was called to order at 1704, 4 August 2008.]

3 MJ [CAPT ALLRED]: Court is called to order. The members have  
4 returned to the courtroom.

5 Mr. President, I understand you are ready to recess for the  
6 evening.

7 PRES: I am, sir.

8 MJ [CAPT ALLRED]: What time would the members like to continue  
9 their deliberations in the morning?

10 PRES: 0830, if that's sufficient.

11 MJ [CAPT ALLRED]: We'll be here at 0830. I would like you be  
12 aware that Mr. Hamdan was excused for the day. He has gone to make a  
13 telephone call to his family. He will be back in the morning to wait  
14 for your decision with the rest of us.

15 Are you satisfied, did we get the exhibits to you in a  
16 manner in which you can use them and access them easily?

17 PRES: Yes, sir.

18 MJ [CAPT ALLRED]: Very good. Okay. We'll recess then until  
19 tomorrow morning at 0830.

20 CDC [MR. SWIFT]: Your Honor, before the members adjourn, just  
21 out of an abundance of caution we'd ask that the media instruction  
22 regarding during deliberations be given.

1 MJ [CAPT ALLRED]: Well, yes, we are not adjourned. Please sit  
2 down while I remind you not to discuss the case amongst yourselves  
3 during the recess, the overnight adjournment, and not to discuss the  
4 case with any members of the media that you may run in to, until the  
5 end of the case.

6 Thank you. We'll stand in recess.

7 **[The military commission recessed at 1705, 4 August 2008.]**

8 **[END OF PAGE]**